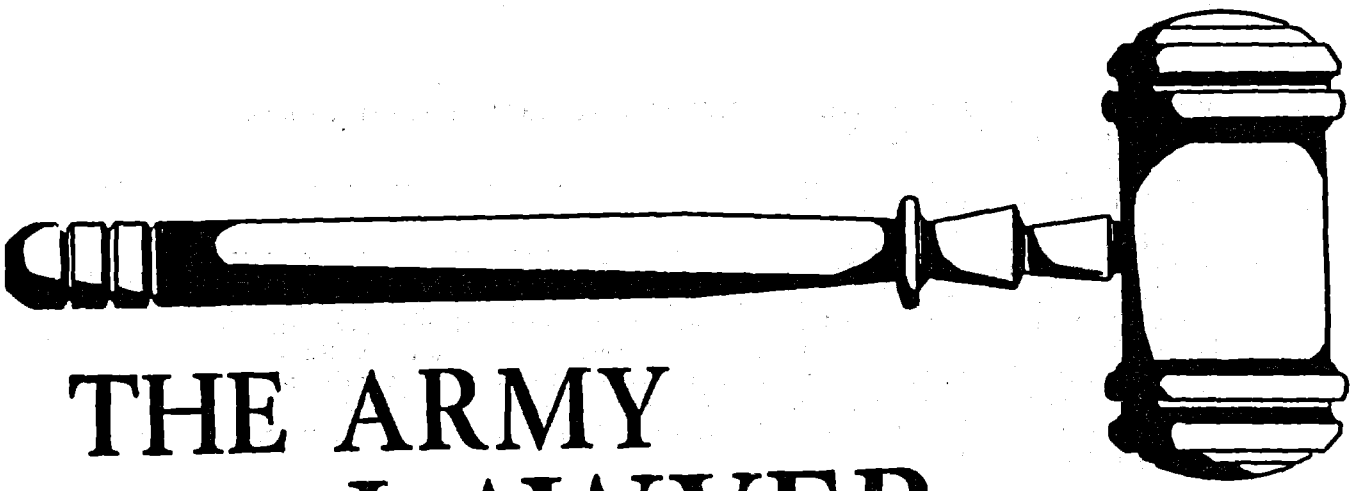

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27–50–172

April 1987

Table of Contents

The Army Lawyer (ISSN 0364–1287)

Editor
Captain David R. Getz

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform System of Citation* (14th ed. 1986) and the *Uniform System of Military Citation* (TJAGSA, Oct. 1984). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as The Army Lawyer, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS–DDL, Charlottesville, VA 22903–1781.

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

JALS-TJ

11 MAR 1987

SUBJECT: Bridging the Gap -- Policy Letter 87-4

STAFF AND COMMAND JUDGE ADVOCATES
COMMANDER, US ARMY LEGAL SERVICES AGENCY
CHIEF, US ARMY TRIAL DEFENSE SERVICE

1. On 15 April 1987 the Trial Judiciary will begin an orientation program called Bridging the Gap to provide information and practical advice to newly-assigned trial counsel and defense counsel concerning court-martial practices and procedures.

2. Primary responsibility for the Bridging the Gap Program rests with our trial judges. They are required to conduct a "gateway session" with each new trial or defense counsel to discuss local practices and procedures and specific counsel duties. The training will:

a. Occur within 30 days of the counsel's assignment, or prior to the counsel's initial court appearance, whichever is first.

b. Be conducted in small-group or individual sessions between judges and counsel.

c. Cover specific topics and supplement the broader training programs of The Judge Advocate General's School, Trial Counsel Assistance Program, Trial Defense Service, and installation SJAs.

d. Emphasize basic mechanics of court-martial practice. As a general rule, trial tactics and strategy are beyond the scope of the program.

3. Please give your complete support to the Trial Judiciary in getting this program underway. Through the Bridging the Gap Program, we can better prepare our counsel and improve the quality of their advocacy.

Hugh Overholt

HUGH R. OVERHOLT
Major General, U.S. Army
The Judge Advocate General

Home-to-Work Transportation: No Longer What It Used to Be

*Major John Popescu**
Administrative Law Division, OTJAG

On 27 October 1986, President Reagan signed Public Law 99-550.[1] It completely revises 31 U.S.C. § 1344 and creates new restrictions on the use of government transportation. The new law will have considerable impact on all Federal agencies. This article summarizes some of the changes affecting Department of the Army (DA). It also provides some of the legislative history and intent that may be of assistance to judge advocates in understanding and working with this new law.

Expanded Scope

Section 1344 now applies to all Federal agencies.[2] This includes any nonappropriated fund instrumentality (NAFI) of the United States.[3] All manner of government transportation capable of carrying passengers is covered. This includes motor vehicles, aircraft, boats, ships, or other similar means of transportation, whether owned or leased.[4] Any funds available to the agency, whether appropriated or nonappropriated, are covered.[5]

Use for Official Purposes

Funds available to DA or to a NAFI may be used for the maintenance, operation, or repair of any government passenger carrier only to the extent that it is used to provide transportation for official purposes.[6] Official purposes are those uses that would further the mission of the agency. This does not include transportation provided solely or even principally for the enhanced comfort or convenience of the officer or employee. Nor does it include home-to-work transportation for officers or employees unless they are so specifically designated in 31 U.S.C. § 1344 or through a procedure described therein. Furthermore, authorization of home-to-work transportation does not imply that government passenger carriers may be used for unofficial purposes.[7]

GSA Regulations

In order to establish consistency and improve compliance, virtually all rulemaking authority has been vested in the General Services Administration (GSA). Individual agencies will, generally, no longer be in a position to rely on their own judgment on the applicability of the statute.[8] GSA, after consulting with representatives from the three branches of government and after an opportunity for public comment, was required to promulgate regulations by March 15, 1987.[9] Military regulations dealing with the use of government transportation will have to be revised to conform with the GSA regulations. DA is expected to issue temporary guidance to cover the interim period.

Authorized Home-to-Work Transportation

Section 1344 is now the sole source of authority for the use of government transportation between a residence and place of employment.[10] "Residence" is the primary place where an individual, who is not on temporary duty, resides while commuting to a place of employment. "Place of employment" is the primary place where an officer or employee performs his or her business, trade, or occupation. It includes an official duty station, home base, or headquarters. It also includes any place where individuals are assigned to work and are not entitled to reimbursement for travel expenses while there.[11]

Generally, employees are required to bear their own commuting expenses. The statute, however, recognizes three situations where home-to-work transportation may be provided. These are: positions at the highest levels of government; temporary emergencies that make it unsafe or impracticable to commute to and from work without the use of government transportation; and job-related requirements.

Designated Positions

Section 1344(b) specifically designates certain positions for which home-to-work transportation may be provided. Within the Department of Defense, these positions are: Secretary of Defense; Deputy Secretary of Defense; Under Secretaries of Defense; Secretaries of the Army, Air Force, and Navy; and the Joint Chiefs of Staff.

---

*This article does not necessarily represent the views of the Office of The Judge Advocate General.

[1] Act of Oct. 27, 1986, Pub. L. No. 99-550, 100 Stat. 3067 (to be codified at 31 U.S.C. § 1344) [hereinafter 31 U.S.C. § 1344].

[2] 31 U.S.C. § 1344(a)(1).

[3] § 1344(g)(2)(J).

[4] § 1344(g)(1).

[5] *Id.* § 1344(a)(1).

[6] *Id.*

[7] H.R. Rep. No. 451, 99th Cong., 1st Sess. 6 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5171, 5176 [hereinafter H.R. Rep.].

[8] 132 Cong. Rec. S15,866 (daily ed. Oct. 10, 1986) (statement of Sen. Proxmire).

[9] 31 U.S.C. § 1344(e). Proposed regulations were printed on March 24, 1987. 52 Fed. Reg. 9448 (1987). Final regulations are expected in June or July of 1987.

[10] *Id.* § 1344(a)(1). Any previous legislation authorizing home-to-work transportation is no longer valid unless specifically recognized by § 1344. Any new legislation authorizing such transportation must specifically indicate that it is an amendment of or an exception to § 1344. *See* H.R. Rep., *supra* note 7, at 7.

[11] H.R. Rep., *supra* note 7, at 7.

Clear and Present Danger, Emergency, or Compelling Operational Reasons

Home-to-work transportation may be provided to an officer or employee for whom the head of the agency makes a written determination, in accordance with GSA regulations, that: highly unusual circumstances present a clear and present danger; an emergency exists; or other compelling operational considerations make it essential to the conduct of official business.[12] Congress must be promptly notified of each determination, to include the name and title of the officer or employee affected, the reason for the determination, and the expected duration of any authorization.[13] Normally, the duration of any authorization under this provision will not exceed fifteen calendar days.[14] Where conditions persist, the head of the agency may, in accordance with GSA regulations, repeatedly extend the authorization for not more than ninety additional calendar days per extension.[15] Congress must be promptly notified of each extension.[16]

Clear and present danger exists whenever the perceived danger is real and imminent and a showing is made that the use of government transportation would provide protection not otherwise available. For example, if an explicit threat of terrorist attacks or riot conditions exist and government transportation is the only means of providing safe passage to and from work.[17]

Emergency exists whenever there is an immediate, unforeseeable, temporary need to provide home-to-work transportation for an agency's essential employees. For example, if a strike or a natural disaster eliminates public transportation to such a degree that an essential employee is unable to reach work. If several essential employees are affected, transportation from predetermined points near the employees' residences would be more appropriate.[18]

Compelling operational considerations are circumstances involving essential employees that are of similar gravity and importance as situations involving a clear and present danger or an emergency. This does not include an employee's irregular hours.[19] Obviously, additional guidance will be needed in this area.

Field Work

Transportation between the residence of an officer or employee and various locations may be authorized if approved in writing by the head of the agency and the transportation is required in the performance of field work.[20] GSA is tasked to establish criteria for defining "field work." As a minimum, the criteria must ensure that transportation between the residence and the location of the field work will be authorized only to the extent that it will substantially increase efficiency and economy.[21]

The provision for field work is intended to cover those employees whose jobs require their presence at various locations that are at a distance from their official duty station. It appears that this provision is not to be used when the individual's work day begins at the official duty station or when the individual normally commutes to a fixed location, however far removed from the official station. For example, an auditor assigned to a defense contractor plant. Also, the designation of a field site as a "field office" would not, of itself, permit home-to-work transportation.[22]

Although the statute no longer specifically authorizes home-to-work transportation for medical officers on outpatient medical services, these individuals should be covered by the field work provision.[23]

Intelligence and Law Enforcement Functions

Transportation between the residence of an officer or employee and various locations may be authorized if approved in writing by the head of the agency and the transportation is essential for the safe and efficient performance of intelligence, counterintelligence, protective services, or criminal law enforcement duties.[24]

Because this provision is not subject to GSA regulations, each agency can immediately establish implementing procedures. There is, however, limited guidance for implementation and a recognized potential for abuse.[25] It appears that this provision was intended to create a narrow exception to the new restrictions on transportation for field work in order to allow agencies emergency response capability for the specified functions.[26]

---

[12] 31 U.S.C. § 1344(b)(8).

[13] *Id.* § 1344(d)(4).

[14] *Id.* § 1344(b)(8).

[15] *Id.* § 1344(d)(2).

[16] *Id.* § 1344(d)(4).

[17] H.R. Rep., *supra* note 7, at 8.

[18] *Id.* at 8–9.

[19] *Id.* at 9.

[20] 31 U.S.C. § 1344(a)(2)(A).

[21] *Id.* § 1344(e)(2).

[22] H.R. Rep., *supra* note 7, at 7. The extent of the field work exception is uncertain because the restrictive language is found in the House report accompanying H.R. 3614. The Senate amended the bill to add, among other things, a provision that requires GSA to define "field work," but did not require GSA to include the restrictive language in the definition. Nevertheless, the Senate did consider the restriction and impliedly approved it by providing an exception to its application only for certain intelligence and law enforcement functions. *See* 132 Cong. Rec. S15,867–68 (daily ed. Oct. 10, 1986) (statement of Sen. Leahy). It is, therefore, reasonable to assume that GSA will incorporate the restrictive language in its definition.

[23] H.R. Rep., *supra* note 7, at 7–8.

[24] 31 U.S.C. § 1344(a)(2)(B).

[25] 132 Cong. Rec. S15,867 (daily ed. Oct. 10, 1986) (statement of Sen. Proxmire).

[26] *Id.* at S15,868 (statement of Sen. Leahy).

Space Available

While not specifically addressed in the statute, agencies may permit officers or employees who are authorized home-to-work transportation to share such transportation with other individuals on a space available basis.[27] This may include the spouses of such officers or employees when accompanying them to and from official functions.[28] There can be no additional expenditure of time or money by the government in order to accommodate these additional passengers, however.[29]

Administration

The authority provided to a head of an agency by 31 U.S.C. § 1344 may not be delegated.[30] All requests for determinations and authorizations must be forwarded to Headquarters, Department of the Army for action by the Secretary of the Army.

Congress expects that transportation authorized pursuant to 31 U.S.C. § 1344 will be provided from existing resources. The statute is not intended to authorize the creation of new personnel positions, purchase or lease of additional vehicles, or upgrade of the current inventory.[31]

Agencies must maintain logs or other records to establish the official purpose for government transportation provided between the residence and place of employment.[32] GAO has suggested that such records include: name of the passenger(s); purpose of the trip; date and elapsed time of each trip; destination; and mileage traveled. These records could then be reviewed regularly to assure compliance with the statutory criteria.[33]

Conclusion

The law pertaining to the use of government transportation has been changed significantly. It is now much more detailed and comprehensive. Additional criteria and requirements have been added to ensure consistency and to monitor compliance while providing some degree of flexibility. Many of the details, however, remain to be worked out in the implementing regulations. Judge advocates should be prepared to advise commanders on the provisions of the new law and to anticipate the legal issues that are certain to be raised.

[27] H.R. Rep., *supra* note 7, at 6; *see also* 62 Comp. Gen. 438, 447 (1983); Ms. Comp. Gen. B–195073 (21 Nov. 1979).

[28] *Administration Proposal Regarding Home-to-Work Transportation for Government Officials; Hearing Before a Subcommittee of the House Committee on Government Operations*, 99th Cong., 1st Sess. 107 (1985) (statement of Milton J. Socolar, Special Assistant to the Comptroller General) [hereinafter Hearing].

[29] *Id.* at 108; 62 Comp. Gen. 438, 447 (1983); Ms. Comp. Gen. B–195073 (21 Nov. 1979).

[30] 31 U.S.C. § 1344(d)(3).

[31] H.R. Rep., *supra* note 7, at 6.

[32] 31 U.S.C. § 1344(f).

[33] *Hearing, supra* note 28, at 77.

Mobilization of Reserve Forces and Legal Assistance

Major John J. Copelan, USAR
174th Military Law Center, Miami, Florida

Introduction

The Reserve Components of the Armed Forces can be called to active duty during wartime, a national emergency, or when required by national security.[1] The act of preparing for war and other emergencies through the assembling and organizing of national resources is known as mobilization.[2] The number of Reserve personnel involved in mobilization can vary from a selective few to a total mobilization depending upon the level of the mobilization.[3] Mobilization of Reserve Components has occurred in 1812, 1917, 1941, 1950, 1961, and 1968.[4] Before 1970, however, Reserve Components had been considered by war planners as reinforcements to be used when active duty forces needed help. Since the end of the draft in 1972, this role has drastically expanded and changed. Indeed, if war were to break out in Europe today, it has been estimated that at least forty-one percent of the American forces deployed in the first thirty days of combat would come from the National Guard and the Army Reserve. It is also projected that by 1990, the Army will have more soldiers in Reserve units than on active duty for the first time in the history of the United States.[5]

Major General William R. Berkman, Chief, Army Reserve, has noted that the "transition from a peacetime reserve status to a wartime active status is a complex process which must be as carefully planned, practiced, and

[1] 10 U.S.C. § 262 (1982).

[2] Dep't of Army, Pam. No. 360–525, Family Assistance Handbook for Mobilization, at 8–1, (1984) [hereinafter DA Pam. 360–525].

[3] See *infra* notes 18–23 and accompanying text.

[4] DA Pam. 360–525, Foreword.

[5] Army Times, Dec. 16, 1985, at 6, col. 1.

critiqued as any battlefield maneuver."[6] Mobilization planning, therefore, is a critical element in Army Reserve readiness. Associated with the mobilization of a large number of reserve forces are many legal problems that may arise involving the newly activated citizen-soldiers and their families. While it can be anticipated that the established legal assistance function[7] of judge advocates will continue during wartime, operational missions and other mission essential tasks may limit available judge advocate resources. In 1984, Congress directed the Secretary of Defense to conduct at least one major mobilization exercise each year and to develop a plan to test periodically the interaction of each active component and Reserve Component upon mobilization and the sustainment of such forces in order to evaluate resource allocation and planning.[8] Providing effective legal assistance to the newly mobilized soldiers and their families is essential to the overall readiness of our Armed Forces upon mobilization and should also be the subject of detailed planning, preparation, and testing. Personnel may be ordered to active duty with no advance warning when required by military conditions. Depending upon the level of mobilization, the notice may be extremely short. While Reserve Component personnel ideally will be given the maximum alert period possible, many legal questions may have to be resolved within a very short period of time during mobilization.[9] Because of this readiness requirement and the necessity for deployment within extremely short periods of time, there is a real need for premobilization legal counseling and planning for Reserve personnel. Indeed, comprehensive premobilization legal counseling is crucial in that many of the judge advocate resources normally available to the mobilization station staff judge advocate (SJA) may be deployed at an early time during mobilization. Therefore, unless they have been properly counseled on premobilization legal matters, newly mobilized Reservists and their families will present substantial legal assistance problems to the SJA, which will further affect the ability of the SJA at the mobilization station to meet the mission with already reduced legal assistance resources. To the extent that legal problems can be identified and solved prior to mobilization, our Reserve citizen-soldiers can be better prepared to concentrate on military missions.

This article will discuss the legal basis for Reserve Components' mobilization, survey legal assistance issues, and overview some of the legal problems that may arise as result of mobilization.

Reserve Components and Mobilization

The Reserve Components consist of seven components: the U.S. Army Reserve, the Army National Guard of the United States, the U.S. Naval Reserve, the U.S. Marine Corps Reserve, the Air National Guard of the United States, the U.S. Air Force Reserve, and the U.S. Coast Guard Reserve.[10] The purpose of the Reserve Components is to provide trained units and qualified individuals for active duty in the Armed Forces in time of war, national emergency, or at such other times as the national security requires.[11] Whenever Congress determines that more units and organizations are needed for the national security than are in the regular forces, the Reserve Component units necessary for a balanced force may be ordered to active duty and retained as long as needed.[12]

Within each armed force there is a Ready Reserve, a Standby Reserve, and a Retired Reserve. Each Reservist is placed in one of those categories and has a status of either active, inactive, or retired. Reserves who are on an inactive status list of a Reserve Component or who are assigned to the inactive Army or Air National Guard are considered to be in an inactive status; members of the Retired Reserve are in a retired status; all other Reservists are in an active status.[13]

Congress has authorized a total strength of 2,900,000 service members in the Ready Reserve; this includes individuals in Reserve Units and individual reservists who are available for active duty, but who are not in a unit.[14] Within the Ready Reserve, there is a Selected Reserve with an organization and unit structure approved by the Secretary of Defense, except the Coast Guard Selected Reserve, which is approved by the Secretary of Transportation.[15] The Selected Reserve concept was initiated by Secretary of Defense Robert S. McNamara in late 1965 when he announced the formation of a Selected Reserve Force consisting of 976 Army Reserve and Army National Guard units whose purpose was to immediately reinforce active forces when necessary.[16] The Selected Reserve Force was authorized to be staffed at 100% of its combat strength and given an increased amount of training as well as an increased priority for equipment.[17]

In time of war or of national emergency declared by Congress, any Reserve unit, and any Reservist not assigned to a unit organized to serve as a unit of a Reserve Component under the jurisdiction of a concerned Secretary, may, without the consent of the persons affected, be ordered by an authority designated by the Secretary concerned to active duty (other than for training) for the duration of the

---

[6] Dep't of Army, Chief, Army Reserve Pamphlet, The Posture of the U.S. Army Reserve and Budget Estimates for Fiscal Year 1987, at 61 (1986).

[7] "Legal assistance," as referred to in Army regulations, is "legal advice and assistance about personal legal problems" given to military personnel. Dep't of Army, Reg. No. 27–3, Legal Services—Legal Assistance, para. 1–5 (1 Mar. 1984) [hereinafter AR 27–3].

[8] Pub. L. No. 98–525, title V, § 552, 98 Stat. 2530 (1984).

[9] DA Pam. 360–525, at 8–4.

[10] 10 U.S.C. § 261 (1982).

[11] *Id.* § 262.

[12] *Id.* § 263.

[13] *Id.* § 267.

[14] *Id.* § 268(a).

[15] *Id.* § 268(c).

[16] Dep't of Army, Pam. No. 140–14, Twice the Citizen: A History of the United States Army Reserve, 1908–1983, at 173 (1984).

[17] *Id.* at 174.

war or emergency and for six months thereafter.[18] So far as practicable, during any expansion of the active Armed Forces which requires ordering Reservists to active duty, members of Reserve units organized and trained to serve as units shall be ordered to duty with those units, but they may be reassigned after being ordered to active duty.[19] The period of time from when a Reservist is alerted for duty and the entry date upon active duty is based upon military requirements at the time.[20]

During a national emergency declared by the President, any Ready Reserve unit and any individual member of the Ready Reserve not assigned to a unit may be ordered to active duty (other than for training) for not more than twenty-four consecutive months without the consent of the persons concerned.[21] Pursuant to 10 U.S.C. § 673, however, not more than one million members of the Ready Reserve may be on active duty (other than for training) at any one time, without their consent, and the President must periodically report to Congress on the active duty status of the Ready Reserve.[22]

When the President determines that it is necessary to augment the active forces for any operational mission, he may authorize ordering any Selected Reserve unit or any member of the Selected Reserve not assigned to a unit, to active duty for not more than ninety days without the consent of members concerned. By law, not more than 100,000 members of the Selected Reserve may be on active duty for this purpose at any one time.[23]

Mobilization can be categorized, based upon the magnitude of the emergency, into four major levels: selective; partial; full; and total. Mobilization authority, as discussed above, resides with the President and/or the Congress. The Secretary of Defense, with the advice and recommendation of the Service Secretaries and the Joint Chiefs of Staff, recommends what mobilization level should be used. In the event of an enemy attack on the United States, emergency mobilization authority resides in Reserve unit commanders, who can order their units to active duty without a mobilization alert order upon receiving authentic information of such an attack over the National Warning System or the Emergency Broadcasting System.[24]

The first mobilization level, selective mobilization, is usually not associated with external threats to national security; instead, it is associated with a domestic emergency wherein the President or Congress mobilizes some Reserve Component units or individual Reservists to protect life, federal property and functions, or to prevent the disruption of federal activities.[25]

Partial mobilization includes those situations discussed above where the President may augment the active forces for an operational mission of up to 100,000 members of the Selected Reserve for up to ninety days, or, in the time of national emergency, may order up to one million members of the Ready Reserve to active duty for up to twenty-four months.

Full mobilization occurs in time of war or a national emergency declared by Congress and involves the activation of all Reserve Component units and individual reservists.

Total mobilization is the highest level of mobilization and involves the expansion of the active armed forces by organizing or activating additional Reserve units along with the mobilization of natural resources as needed.[26]

There are several phases of mobilization: preparatory; alert; mobilization at home station; movement to mobilization stations; and operational readiness. The preparatory phase occurs during peacetime activities and includes mobilization planning, training, and other activities preparatory to actual mobilization, including premobilization legal counseling.[27]

The alert phase begins when the unit receives a notice or warning through command channels of a pending order to active duty and ends when the unit enters active federal service. The mobilization at home station begins with the unit's entry to federal service and ends with the unit's departure for its mobilization station.[28] The movement phase covers the departure from home station to arrival at mobilization station where the operational readiness phase commences. The goal of the unit during the final operational readiness phase is to attain readiness in the shortest possible time. The phase ends when the unit is declared operationally ready for deployment.[29] At that time, mobilization is complete.

Legal Assistance for Reservists

Although Congress only recently recognized legal assistance in the military with statutory authority, the Army JAGC historically has taken a "proactive" approach toward providing legal assistance.[30] The statutory authority for legal assistance programs is now found at 10 U.S.C.

---

[18] 10 U.S.C. § 672(a) (1982). A member on an inactive status list or in a retired status, however, may not be ordered to active duty under section 672 unless the Secretary concerned with the Approval of the Secretary of Defense in the case of the Secretary of a Military Department determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available. *Id.*

[19] 10 U.S.C. § 672(c) (1982).

[20] *Id.* § 672(e).

[21] *Id.* § 673(a).

[22] *Id.* § 673(d).

[23] *Id.* § 673b.

[24] DA Pam. 360–525, at 8–3, 8–5.

[25] *Id.* at 8–2.

[26] *Id.*

[27] *Id.* at 1–1, 8–6.

[28] *Id.* at 8–6.

[29] *Id.*

[30] Hansen, *Practical Pointers for Legal Assistance Officers: A View from the Top*, 112 Mil. L. Rev. 3, 5 (1986).

§ 1044; however, legal assistance programs are discretionary, subject to the availability of legal staff resources.[31]

It is Department of the Army policy to provide legal advice and assistance to members of the Armed Forces on active duty and to other eligible individuals regarding their personal legal affairs. The Army legal assistance program was established to implement this policy.[32] The program was to provide prompt and effective assistance to soldiers in resolving their personal legal difficulties so as to avoid low morale and combat inefficiency, because these difficulties, if left unassisted, may lead to disciplinary problems.[33]

The ability to provide effective legal assistance to the newly mobilized civilian-soldier is an essential element to improving overall force readiness. General John A. Wickham, Chief of Staff of the Army, has stated that along with training, maintaining, and leading, the Army must place special emphasis on finding solutions to soldiers' problems and in improving their welfare along with that of their families.

> Our most important mission is to maintain the readiness of the Army in order to protect this great nation. This is our first task. But readiness is inextricably tied to soldiers' morale and discipline, and to sustaining their families' strength. Therefore, to the extent we can make those soldiers and families feel better about the Army and the support provided by the Army, then the better off will be the soldier, the Army and the Nation.[34]

Under AR 27–3, the responsibility for the Army Legal Assistance Program has been vested in The Judge Advocate General, and certain commanders are authorized to establish legal assistance offices.[35] Active Army commissioned officers may be detailed as legal assistance officers if they are: members of or detailed to the Judge Advocate General's Corps; members of the bar of a federal court or of the highest court of a state or territory of the United States; and designated as a legal assistance officer by the supervising staff judge advocate.[36]

Reserve Component officers may be detailed as either a legal assistance officer or a special legal assistance officer. Reserve Component commissioned officers in an annual training, active duty for training (ADT), or inactive duty for training status, may be detailed as a legal assistance officer if they are: members of the Judge Advocate General's Corps; members of the bar of a federal court or of the highest court of a state or territory of the United States; and designated as a legal assistance officer by the supervising active Army staff judge advocate. Reserve Component commissioned officers not serving in an annual training, active duty for training, or inactive duty training status, may be appointed as special legal assistance officers by The Judge Advocate General or his delegate if they are members of the Judge Advocate General's Corps and members of the bar of a federal court or of the highest court of a state or territory of the United States.[37] For example, Reserve judge advocates were appointed as special legal assistance officers to provide legal assistance to the survivors of soldiers who died in the tragic air crash at Gander, Newfoundland, in December 1985.

Also, Department of Army civilian attorneys may be designated by the supervising staff judge advocate as legal assistance attorneys if they are members of the bar of a federal court or of the highest court of a state or territory of the United States. Additionally, in foreign countries, the supervising staff judge advocate may designate individuals as legal assistance attorneys provided they are licensed or otherwise professionally qualified as attorneys under local law. They may be employed on either a full- or part-time basis to provide assistance on matters of local law.[38]

AR 27–3 states that legal assistance will be provided to members of the Armed Forces on active duty or ADT for periods of thirty days or longer.[39] This includes Reserve Component personnel serving on active duty for thirty days or longer. It also includes their family members if resources are available.[40]

The Judge Advocate General has directed legal assistance officers to take a "proactive" approach to legal assistance, to develop programs that are both imaginative and innovative, to provide preventive law services, and to provide comprehensive legal assistance to our clients.[41] TJAG Policy Letter 84–1[42] established guidance for rendering legal assistance services to members of the Reserve Components serving on annual training, active duty for training for periods of twenty-nine days or less, and during periods of inactive duty for training. Noting the impact on morale and mission readiness, this letter authorizes limited legal assistance to be given to such Reserve Component personnel by Reserve Component judge advocates designated as legal assistance officers and special legal assistance

---

[31] *Id.*

[32] AR 27–3, para. 1–5.

[33] *Id.*

[34] Dep't of Army, Chief of Staff Pamphlet, Guideposts for a Proud and Ready Army, at 14 (1 Mar. 1985).

[35] Pursuant to AR 27–3, para. 1–4*b*, those commanders who are empowered to convene general courts-martial and commanders of installations having an Army judge advocate or Department of the Army civilian attorney assigned to their staff are authorized to establish a legal assistance office.

[36] AR 27–3, para. 1–6*a*.

[37] *Id.*, para. 1–6*b*.

[38] *Id.*, para. 1–6*c*.

[39] *Id.*, para. 1–8*a*.

[40] *Id.* para. 1–8*a*, *b*. "Family members" are defined *id.*, para. 1–8*c*.

[41] Overholt, *Introduction to the Second Legal Assistance Symposium*, 112 Mil. L. Rev. 1,2 (1986); *see* Policy Letter 86–8, Office of The Judge Advocate General, U.S. Army, subject: Comprehensive Legal Assistance, 29 July 1986, *reprinted in* The Army Lawyer, Sept. 1986, at 3.

[42] Policy Letter 84–1, Office of The Judge Advocate General, U.S. Army, subject: Reserve Component Legal Assistance, 16 Feb. 1984, *reprinted in* The Army Lawyer, Mar. 1984, at 2.

officers.[43] This legal assistance is limited, however, to military administrative and readiness matters. Such assistance normally will consist solely of advice and counseling. In connection with readiness counseling, Reserve Component legal assistance officers will educate and advise reservists about legal documents that soldiers may need. Routine document preparation that furthers mobilization readiness may include simple wills and powers of attorney. TJAG Policy Letter 86–9 reemphasized and expanded upon the policy found in TJAG Policy Letter 84–1 and provided that legal assistance by Reserve Component judge advocates that prepares Reserve Component soldiers for mobilization should be provided to the "maximum extent" that resources permit without detracting from unit preparedness.[44]

Reservists will more than likely be concerned about the effect that mobilization will have on the continuation of day-to-day operations of their civilian business interests, etc. These matters, however, are beyond the scope of services available from military legal assistance officers and must be addressed by civilian counsel.

Personnel and family issues will most likely present the preponderance of legal problems during mobilization. To assist in premobilization legal counseling, Department of Defense Form 1543[45] is used to ensure that these potential legal problems are addressed. Reserve personnel should be advised to periodically examine and update their wills and insurance policies. While the Army does not require that soldiers have wills, The Judge Advocate General authorized wills to be provided to Reserve Component soldiers. Also, the reservist should be counselled on the availability of a power of attorney, and TJAG Policy Letter 84–1 specifically authorizes assistance with powers of attorney for Reserve Component personnel.

In the event of mobilization, Reservist's families should be aware of assistance available from military installations and of their benefits and entitlements. The State Area Command (STARC), the state military headquarters, will be a good source of information and a referral on federal, state, and local support available to military family members. The same information and referral will probably also be available at armories, recruiting stations, and Reserve Commands and Centers.[46] Also, a good summary of available benefits, assistance, and policies is the *Family Assistance Handbook for Mobilization,*[47] which is available from local Reserve units.

The greatest source of legal protection at the time of call up for Reservists and their families is the Soldiers' and Sailors' Civil Relief Act.[48] Summarized in a nutshell, it provides for the suspension of enforcement of civil liabilities of persons in the military service of the United States, including the temporary suspension of legal proceedings and transactions that may prejudice these individuals' rights. Any legal assistance officer who may be called upon to provide assistance to mobilized reservists must be familiar with the Act and be prepared to advise the Reservist on his or her rights under the Act. A complete discussion of the Act is beyond the scope of this article. There is, however, an excellent pamphlet that thoroughly discusses all aspects of the Act that should be consulted when advising a client on the Act.[49]

By definition, "military service" is:

> Federal service on active duty with any branch of service, heretofore, referred to or mentioned [all members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy] as well as training or education under the supervision of the United States preliminary to induction into the military service.[50]

Reservists called to active duty as part of a mobilization would therefore qualify for the Act's protection.[51] Furthermore, derivative protection to persons jointly liable with such soldiers on an obligation is available under section 513 of the Act. As a result, therefore, spouses, family members of the soldier, and others, may avail themselves of the Act's protection in those situations where they are sureties, guarantors, endorsers, accommodation makers, and others, whether primarily or secondarily subject to an obligation or liability of which the performance or enforcement is stayed, postponed, or suspended.[52] While Section 513 relief is discretionary, section 536 of the Act also makes provisions for the extension of certain benefits to dependents of a person

---

[43] *Id.* para. 2.

[44] Policy Letter 86–9, Office of The Judge Advocate General, U.S. Army, subject: Legal Assistance for Reserve Component Personnel, 8 July 1986, *reprinted in* The Army Lawyer, Sept. 1986, at 4.

[45] Dep't of Defense, Form No. 1543, Annual Legal Checkup (Sept. 1965).

[46] DA Pam. 360–525, at 7–1.

[47] *See supra* note 2 for a complete citation to DA Pam. 360–525.

[48] 50 U.S.C. app. §§ 501–591 (1982).

[49] Dep't of Army, Pam. No. 27–166, Soldiers' and Sailors' Civil Relief Act (15 Aug. 1981) [hereinafter DA Pam. 27–166]. *See also* Chandler, *The Impact of a Request for a Stay of Proceedings Under the Soldiers' and Sailors' Civil Relief Act,* 102 Mil. L. Rev. 169 (1983); Folk, *Tolling of Statutes of Limitations Under Section 205 of the Soldiers' and Sailors' Civil Relief Act,* 102 Mil. L. Rev. 157 (1983); Hooper, *The Soldiers' and Sailors' Civil Relief Act of 1940 as Applied in Support Litigation: A Support Enforcement Attorneys' Perspective,* 112 Mil. L. Rev. 93 (1986); Reinold, *Use of the Soldiers' and Sailors' Civil Relief Act to Ensure Court Participation—Where's the Relief?,* The Army Lawyer, June 1986, at 17.

[50] 50 U.S.C. app. § 511(1) (1982).

[51] Bowles v. Dixie Cab Ass'n, 113 F. Supp. 324 (D.C.D.C. 1953), (a member of the Naval Reserves was in "military service").

[52] 50 U.S.C. app. § 513 (1982).

in military service.[53] Although this protection for dependents is phrased as being of a limited nature, upon a proper showing a dependent may be able to obtain the same protection under the Act as the solder. It is important to note that "dependent" under the Act is not defined and courts have interpreted this term to include parents[54] and spouses,[55] but not partners.[56] It has been suggested that the definition of "dependent" in AR 27–3 should be argued as the definition to be used under the Act.[57]

The Soldiers' and Sailors' Civil Relief Act applies in the fifty states, the District of Columbia, and all territory subject to the jurisdiction of the United States.[58] The Act has been applied to the United States Government and state and local governments in judicial proceedings.[59] The Act specifically applies to court proceedings, but, in a few cases, it has been found not to apply to administrative proceedings.[60] For the most part, the Act's protections terminate with the date of discharge from active duty or death while on active duty. Some sections, however, extend the period of "military service" for asserting the Act for additional periods ranging from thirty to ninety days.[61]

Protections under the Act can be waived, but such waiver must be in writing and executed after the soldier is eligible for protection under the Act.[62] Waivers executed before this time are ineffective. The Act is not only a defensive tool, but it also provides for anticipatory relief, allowing a soldier to initiate the action and avoid a default situation.[63]

Some of the general reliefs afforded under the Act include a requirement for affidavits prior to the entry of default judgments; the necessity of the appointment of an attorney to represent soldiers; the stay of proceedings where military service affects the conduct of the defense of an action; relief against the imposition of fines and penalties on contracts; stay of the execution of judgments; the vacation or stay of attachment or garnishment of soldiers' property; the tolling of the statutes of limitations during the period of military service; and a maximum rate of interest during the period of service. The Act, under article III, provides for specific relief for evictions, installment sales contracts, mortgages, foreclosure on real and personal property, storage lien foreclosures, the rights of life insurance assignments, and lease terminations. The provision dealing with the nonpayment of rent protects against evictions or distress, and further provides criminal sanctions for eviction or attempted evictions.[64] Other areas of the Act's coverage include sections dealing with insurance, taxation, and public lands, all of which the legal assistance officer should be thoroughly familiar with in advising the Reservist upon mobilization.

Lastly, another issue of extreme importance to the mobilized Reservist is the effect that the call up will have on a job that was left behind. Reservists, upon being called to active duty in a mobilization, receive certain reemployment rights by law.[65] While it might be perceived that reemployment rights would be more a concern of a Reservist who is about to be released from active duty, these rights should be explained to the Reservist upon mobilization so as to minimize the concern about reemployment and to prevent the soldier from taking improvident actions that might hamper reemployment. Legal assistance officers counseling reservists should be aware that Congress has left open the opportunity for states or political subdivisions to enact laws that establish greater protection and additional rights.[66] Therefore, to fully protect the Reservist's rights and maximize their benefits, legal assistance attorneys must be cognizant of possible state and local law benefits as well as federal law benefits, upon mobilization for active duty.[67]

Conclusion

Mobilization of Reserve Components is a complex process that is critical to the readiness of our Armed Forces. Providing effective legal assistance to mobilized Reservists and their dependents is an essential task related to this readiness. There is a significant amount of legal assistance available to our citizen soldiers through existing military legal assistance programs. But, depending upon the level of mobilization, the judge advocate assets available for legal

---

[53] *Id.* § 536 (1982), provides in pertinent part:
Dependents of a person in military service shall be entitled to the benefits accorded to persons in military service under the provisions of this article [sections 530 to 536 of this Appendix] upon application to a court therefor, unless in the opinion of the court the ability of such dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applicants are dependent.

[54] Reid v. Margolis, 181 Misc. 222, 44 N.Y.S.2d 518 (N.Y. Sup. Ct. 1943).

[55] Tucson Telco Fed. Credit Union v. Bouser, 9 Ariz. App. 242, 451 P.2d 322 (Ariz. Ct. App. 1969).

[56] Patrikes v. J.C.H. Service Stations, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y. City Ct. 1943).

[57] Bagley, *The Soldiers' and Sailors' Civil Relief Act—A Survey*, 45 Mil. L. Rev. 1 (1969).

[58] 50 U.S.C. app. § 512 (1982).

[59] DA Pam. 27–166, at 2–3 and 2–4.

[60] United States v. Franz, 220 F.2d 123 (3d Cir. 1955); Polis v. Creedon, 162 F.2d 908 (Emer. Ct. App. 1947).

[61] DA Pam. 27–166, at 2–3.

[62] 50 U.S.C. app. § 517 (1982).

[63] *Id.* § 590.

[64] *Id.* § 530; DA Pam. 27–166, at 4–2.

[65] *See generally* 38 U.S.C. §§ 2021–2024 (1982).

[66] 38 U.S.C. § 2021(c) (1982). *See, e.g.*, Fla. Stat. § 115.09 (1984), where all state and county officials and all others who hold office under the state, district school officer and municipal official, may be given leave to perform active military service, the first 30 days of the leave with full pay and the remainder without pay. Likewise, under Fla. Stat. § 115.14 (1984), in the discretion of the employing authority, employees may be granted the same rights and privileges as the above officials.

[67] State Bar programs, such as The Florida Bar Military Law Committee's "Operation Standby," where military attorneys can consult with member civilian attorneys regarding questions relating to local law, are a good source of assistance to legal assistance officers in identifying additional local law benefits, etc.

assistance may be limited or devoted to operational missions. Therefore, premobilization counseling of Reservists and identifying potential legal problems is crucial. Such preventive law measures can identify and eliminate major legal problems that arise when personnel are ordered to active duty with little or no advance warning. Ultimately, effective legal assistance programs for mobilized Reservists will significantly contribute to the overall readiness and effectiveness of the Reserve Components as they are integrated into the Army's total force as a full partner.

Impeachment: An Overview

Major E.V. Kelley, Jr., U.S. Marine Corps
Military Judge, Keystone Trial Judicial Circuit, Okinawa, Japan

"He who states his case first seems right, until the other comes and examines him." Proverbs 18:17

The Military Judge's Bench Book[1] states, in part, that "The final determination as to the weight or significance of . . . the credibility of the witnesses . . . rests solely upon [the] members" (or upon the judge in a bench trial). Far too often, the members are left with only their impressions of the witness and the inherent probability or improbability of the witness' testimony. Any witness, however, can be impeached.[2] The task of the trial attorney is to find the proper impeachment tool.

Impeachment is, very simply, any attack upon the credibility of a witness. Traditionally, there are five ways to impeach. Three of these methods (prior inconsistent statement, bias, and character attack) have been codified in the Military Rules of Evidence, and one (impeachment by contradiction) is implicit within the Rules. The fifth traditional method of impeachment (a showing of defect in the capacity of the witness to observe, remember, and state the facts) is fairly straightforward. And a sixth, never to be overlooked method to diminish a witness' credibility is "self-impeachment." This article will give a thumb-nail sketch of each method, and examine, where appropriate, occasions where each may be warranted.[3]

Prior Inconsistent Statement

Though the military judge instructs the members not to consider the prior statement for the truth of the matter asserted, but only as it may affect the "believability of the testimony [of the witness],"[4] a strong, material, prior inconsistent statement carries great psychological effect, and can be the most damning kind of impeachment. Mil. R. Evid. 613 simply allows a party to show that a witness has, on a prior occasion, made a statement that is inconsistent with his or her testimony in court. Note that, when the prior statement is in a writing, Rule 613(a) abolishes the rule in *Queen Caroline's Case.*[5] Rule 613(a) states that the statement "need not be shown . . . to the witness" before cross-examination.[6] Thus, if the cross-examiner has done his or her homework, and if the proponent has not, the witness will probably be unprepared for this line of questioning. The impeaching attorney has earned a "Prior Statements by Witness" instruction from the judge, counsel may argue to the members from this instruction, and the witness has been slam-dunked. Remember though, that the cross-examiner should establish a proper foundation for his or her questions, and that the threshold requirements of relevancy always apply. It is important to note the importance of allowing the witness the opportunity to explain or deny the prior statement. Rule 613(b) makes it clear that if this is not done, counsel may not introduce the statement into evidence.[7]

Bias

The general idea here is that if a person is biased, prejudiced, or has any motive to lie, his or her testimony is inherently suspect. Often, witnesses do not intend to misrepresent the truth. Rather, their perceptions of the truth are colored by their relationships with either side. Other times, a witness may deliberately distort the facts. In either case, the cross-examining attorney may use this bias. Even if the witness testifies in complete accord with the facts as he or she understands them, bias may be used to attack credibility. The important thing to remember about bias is that the cross-examiner gets the best of both worlds; the witness may be impeached "either by examination of the witness or by evidence otherwise adduced."[8] If the witness admits bias under oath, your point has been made. If the witness denies bias, you may offer extrinsic evidence of the

[1] Dep't of Army, Pam. No. 27-9, Military Judges' Benchbook, para. 2-29.1 (1 May 1982) (C2, 15 Oct. 1986) [hereinafter Benchbook].

[2] Mil. R. Evid. 607.

[3] For a more detailed treatment of impeachment, see Gilligan, *Credibility of Witnesses Under the Military Rules of Evidence*, 46 Ohio St. L. Rev. 595 (1985); Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law—Evidence, chapter 7 (June 1986) (to be published as Dep't of Army, Pam. No. 27-22).

[4] Benchbook, para. 7-11 I.

[5] 2 B&B 284, 129 Eng. Rep. 976 (1820). The rule in Queen Caroline's Case required counsel to show the writing to the witness before he could be cross-examined upon it.

[6] *See generally* United States v. Callara, 21 M.J. 259, 264-65 (C.M.A. 1986).

[7] See *Callara* regarding the timing of this "explanation." Interestingly, there is authority that states that it is the calling party's responsibility, and not the cross-examiners, to have the witness "explain." United States v. McLaughlin, 663 F.2d 949 (9th Cir. 1981).

[8] Mil. R. Evid. 608(c).

witness' bias, and the witness is destroyed in place. When impeaching for bias, however, be especially mindful of violating the cardinal rule by asking the one question too many. For example, one may ask:

Q: Isn't the accused your husband?

A: Yes.

Q: You love him very much, don't you?

A: Yes.

Q: If he's convicted today and if he goes to jail you'll be without a means of support, won't you?

A: Yes.

Q: Mrs. Jones, you would do anything for your husband, wouldn't you?

A: Yes.

TC: Thank you, Your Honor, no further questions of this lady.

Then the attorney may argue to the fact finder thusly: "Mrs. Jones has stated that she loves the accused, that she has no other means of support if he goes to jail, and that she would do anything for him. The government suggests that she has lived up to her word. The facts of this case, coupled with her bias, should lead you to the inescapable conclusion that she has lied to this Honorable Court."

Consider, however, the one question too many:

Q: Mrs. Jones, you would do anything for your husband, wouldn't you?

A: Yes.

Q: You would lie for him, wouldn't you?

A: No.

And trial counsel sits down with nothing.

Character Attack

The rules prescribe three methods for a character attack: conviction of crime,[9] bad acts,[10] and opinion or reputation evidence for truthfulness.[11]

Rule 609 is fairly straightforward, though often overlooked. During your pretrial interviews, you should routinely ask adverse witnesses whether they have been convicted of a crime. Further, you should screen their service records to discern whether they have admissible military convictions. Note that, so long as the requirements of admissibility are met, it is of no import whether the military conviction was by general, special, or even summary court-martial.[12] I suggest that there are many witnesses who have in their past fallen, been punished, and are now fashioning successful careers. With some investigatory effort, an industrious attorney has a golden impeachment opportunity at trial. The important thing here, though, is to apply the rule properly in trial mechanics. "[E]vidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination. . . ."[13] In other words, all this must be done while the adverse witness is on the stand. In the words of the circuit judge of the Piedmont Circuit of the Navy-Marine Corps Trial Judiciary at a general court-martial several years ago, "Once the witness has stepped down, you can't just whistle this stuff in."

Rule 608(b) permits inquiry of the witness, within the discretion of the trial judge, for prior bad acts if probative of truthfulness or untruthfulness. Many counsel think that these prior bad acts may not be addressed as specific instances. This is not so. The rule is that these bad acts may not be proved by extrinsic evidence. Thus it has been said that, if the witness responds denying the bad act, the cross-examiner must "take the witness' answer." This also is not so. The cross-examiner may attempt to "chip away" at the witness' denial by inquiring into specifics of the bad acts.[14] Such cross-examination may continue as long as it is reasonable under the circumstances.[15] The requirement here is an ethical consideration of good faith by the questioner. It is error (and ungentlemanly/unlady-like) for the questioner to inquire into an area where he or she has no good faith information that the inquiry is legitimate. Attorneys should also be mindful that a judge's principal consideration is likely to be that of confusion of the issues at bar. So, although questioning may be perfectly permissible within Rule 608(b), know that the judge has the discretion to keep it out.[16]

Rule 608(a) is another straightforward rule. It permits impeachment by showing the witness' poor reputation in the community for truthfulness or by opinion that the witness' veracity is held in low regard. In my experience, Rule 608(a) is the most often used impeachment technique. It is used so often that opposing counsel tend to let the opposition get away with far too much. *Some* foundation is required. A typical 608(a) scenario follows:

Q: How long have you known the accused?

A: One year.

Q: What is your military relationship to him?

A: He works for me, I am his noncommissioned officer-in-charge.

Q: Have you formed an opinion about his character for truthfulness?

---

[9] Mil. R. Evid. 609.

[10] Mil. R. Evid. 608(b). For a detailed examination of this type of impeachment, see Pence, *Military Rule of Evidence 608(b) and Contradictory Evidence: The Truth-Seeking Process*, The Army Lawyer, Feb. 1987, at 30.

[11] Mil. R. Evid. 608(a).

[12] A conviction by summary court-martial can only be admitted if the witness was represented by counsel. United States v. Cofield, 11 M.J. 422 (C.M.A. 1981).

[13] Mil. R. Evid. 609(a).

[14] United States v. Owens, 21 M.J. 117, 121 n.2 (C.M.A. 1985) ("Within reason, it [the government] could rephrase its question in terms of the specific matters omitted so as to gradually but dramatically induce appellant to abandon his previous more general denials.") (citations omitted).

[15] *Id. See generally* S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 518 (2d ed. 1986).

[16] Mil. R. Evid. 403, 608(b).

A: Yes.

Q: What is your opinion.

A: He is untruthful.

Note from this dialogue there has been no showing: that the accused has worked for the NCOIC for a year—only that he has known the accused for that time period; of the length of time that they have had their military relationship; how often the witness has observed the accused (maybe the accused's work area is separated from the witnesses' by some miles); etc. In brief, no foundation has been established that would enable the fact finder to give the appropriate weight to the witnesses' testimony. Still, time and again the question is asked absent opposing counsel's objection. Only an activist judge would sua sponte stop the witness from offering his or her opinion. With a timely objection on the record, however, a witness will not be able to give a showing of reputation in the community or an opinion of truthfulness without a proper foundation.

Impeachment by Contradiction

Impeachment by contradiction is the common law method of offering proof that the facts are not as the witness states. It is implicit within the Rules[17] and explicitly sanctioned by case law.[18] In a typical scenario, Victim testifies that he was walking onto base when Accused assaulted him. Eyewitness then testifies that he saw the affray while returning from standing a duty watch; that it was Victim who was the aggressor, and not Accused. It is in this regard that Eyewitness has "contradicted" Victim. Impeachment by contradiction is an effort to diminish the credibility of the former witness through a showing of inconsistency via the testimony of the latter witness.

Impeachment by contradiction lines are drawn, however, regarding collateral matters. Referring again to our example above, if it is conceded that Eyewitness saw the alleged assault, it would ordinarily be "collateral" that he was returning from liberty instead of returning from standing duty. Ordinarily, whether Eyewitness was returning from duty or from liberty has little, if anything, to do with his observation of the fight. Cross-examination on this point would present the clear dangers of misleading the fact finder and confusing the issues.

If the questions are not of a collateral nature, however, impeachment by contradiction can be a powerful impeachment tool. For example, if Eyewitness was returning from liberty with Accused, instead of from duty, this would be proper evidence of Eyewitness' bias. Similarly, if Eyewitness had become intoxicated while on liberty, this would be proper evidence that he had some defect of capacity to observe the facts.

There is one final important matter in this area. Impeachment by contradiction is by its very nature extrinsic evidence. Your opponent will not be able to keep it out by such a claim. In this regard, there are occasions where impeachment by contradiction can be far more useful to the advocate than would be, for example, specific instances of bad conduct.

Self-Impeachment

Every advocate has the obligation to present his or her client, be it the accused or the government, to the fact finder in the best possible light.[19] Therefore, the attorney who overlooks the obvious but less technical facts of correct grooming and proper deportment before the court may start the trial already playing catch-up. Our system of justice is adversarial. An advocate who presents his or her witness in a favorable manner does so to the detriment of the opposition. The list is extensive, but the following are some of the more common trappings of a witness when the attorney fails to be aggressive in this area: shabby haircut; eccentric haircut (everyone knows that if an accused parts his hair down the middle he is either a drug user or a homosexual); offensive tattoos (have the witness wear a long sleeve shirt); poor posture while on the stand; poor manners while on the stand ("yeah," "no," etc.); anything less than a fresh uniform; moustache; and the list goes on. Self-impeachment is so damning that it has been called "impeachment by self-destruction." These comments carry twice the import when the witness is the accused. The conduct of a criminal trial is difficult enough; a lawyer does not want to give away unnecessary yardage by beginning with a dull veneer.

Summary

A final word on all this. While it is true that after a witness' credibility has been called into question the opposition may attempt to rehabilitate the witness, I suggest that once effective impeachment has happened, rehabilitation becomes a formidable task. Once dulled, some things refuse to shine again.

An attorney does not make the facts. But he or she can make the most of the facts that exist. It is a most rare case that does not offer many opportunities for creative impeachment. Because the opportunities are there; it is all a matter of doing. An advocate who is preparing to launch a character attack should remember that some of these impeachment rules are fairly esoteric. It may be a rebuttable presumption that the judge knows the law; most judges, however understand the law once it has been intelligently explained to them. It is incumbent upon the advocate to expect an objection from the opposition, to educate the judge after the objection regarding what method of impeachment is being used, and to articulate intelligently why the judge should overrule the opposition's objection. Remember that many calls in this area are discretionary with the judge, and the decision usually goes to the more convincing advocate.

Let's face it. Most criminal lawyers are not very good cross-examiners. But I believe that most criminal lawyers can be effective cross-examiners with work, foresight, and a game plan. Cross examination should not be a "fishing expedition." Fishing expeditions rarely yield a catch and usually amount to no more than a waste of everyone's time. The mechanics of cross-examination are provided in the Rules. Do not go groping for an answer that may not come. Words are our craft and the Rules are our tools. Successful use is simply a matter of diligence, preparation, and schooling your judge. Criminal trials are won in preparation—not during the conduct of the litigation.

---

[17] Mil. R. Evid. 607.

[18] United States v. Banker, 15 M.J. 207 (C.M.A. 1983); United States v. Bowling, 16 M.J. 848 (N.M.C.M.R. 1983).

[19] Model Code of Professional Responsibility EC 7-1 (1980).

LAAWS Status Report

Lieutenant Colonel Daniel L. Rothlisberger
Information Management Officer, OTJAG

Introduction

As the Information Management Officer (IMO) at the Office of The Judge Advocate General (OTJAG) for the past year and a half, I have seen the Legal Automation Army-Wide System (LAAWS) project take on a recognizable form. LAAWS has gone from the conceptual stage that I discussed in my article entitled "JAGC Automation Overview"[1] to the implementation stage. This article updates those earlier observations and elaborates upon architectural and operational considerations related to the ongoing LAAWS implementation process.

Establishing a Baseline

In October 1985, I sent a letter to command and staff judge advocates setting forth the following OTJAG automation objectives:[2] develop a project management plan for LAAWS; develop hardware and software standards; select, justify, and acquire computer hardware and software; and publish information on automation issues common to the JAGC community.

In the time since that letter was sent, the first and second objectives have been accomplished.[3] The third objective has been accomplished in most OTJAG divisions and is being energetically pursued in the three OTJAG field operating agencies. The fourth objective is being addressed on a continuing basis; this article being part of the information sharing process.

In addition to setting forth OTJAG automation objectives, the October 1985 letter requested that each office complete an automation status questionnaire providing a description of the automation equipment and software in use. This status report was designed to do two things. First, it gave information upon which to establish a JAGC automation baseline. At that time, no one knew how many different kinds of automation equipment we had in use and how incompatible the various parts of our law firm really were. Second, it identified the offices that had equipment capable of running LAAWS software that was being developed to run on IBM-compatible personal computers (PCs).[4]

The information received from the completed questionnaires was entered into a computer data base and those offices having compatible PC workstations were placed on the distribution list for LAAWS software. Offices not on the list initially were added as they acquired compatible hardware and software.[5] The completed questionnaires also revealed the number and location of individual PC workstations. Based on this number, we could tell how far we were from our objective configuration ratio of one automated workstation for every person who works within the JAGC office automation environment.[6] In an effort to keep pace with recent PC acquisitions, an updated status report was requested by Dep't of the Army message P031800Z Feb 87, subject: PC Workstations for LAAWS. Responses to this message will be used to determine the distribution scheme for approximately 500 PC workstations that will be acquired *if* HQDA funds become available in FY87. The objective is to have at least one PC workstation in every JAGC claims office by 1 January 1988.[7]

LAAWS Project Management Plan

Acquisition of PC workstations is an early milestone in the LAAWS project management plan, which is based on the Army's three-tiered automation architecture as described in Department of the Army Pamphlet 25-1.[8] This architectural approach calls for development of three levels (tiers) of automation. They are: the user level (Tier 3); the office network level (Tier 2); and the JAGC-wide network level (Tier 1). As these architectural pieces are put in place, they will support the operation of LAAWS functional modules such as the Claims Legal Automated Information Management System (CLAIMS) and the Army Courts Martial Information System (ACMIS).[9]

Tier 3

Regardless of the functional activity being performed, the first step in the LAAWS implementation process is acquiring IBM-compatible PC workstations. The PC is our lowest common denominator and is a fundamental ingredient in standardizing automation of legal activities. Under the LAAWS concept, attorneys, paralegals, and administrative and clerical personnel will use standard PC workstations to

---

[1] Rothlisberger, *JAGC Automation Overview*, The Army Lawyer, Jan. 1986, at 51.

[2] Letter, DAJA-IM, Office of The Judge Advocate General, U.S. Army, subject: JAGC Automation Update, 25 Oct. 1985.

[3] The LAAWS Project Management Plan was completed by the Amercian Management Systems, Inc. on 30 June 1986. Copies of the plan have been provided to the Commander, Information Systems Command.

[4] The LAAWS software model was described in Note, *LAAWS Software Development*, The Army Lawyer, June 1986, at 24.

[5] The list of offices with compatible hardware and software has grown from 47 to 72 in the past eight months.

[6] The time needed to reach the ratio of 1:1 will depend on available funding. The plan to achieve that ratio should be made clear to local Director of Information Management and Deputy Chief of Staff, Resource Management personnel from the beginning.

[7] Funds have been requested to automate the present individual claims data reporting (DA Form 3) process. The first step is completing the automation of the U.S. Army Claims Service, Fort Meade. The second step is acquisition of at least on PC terminal and software for each claims office. The third step is acquisition of PCs, software, and printers for all claims personnel.

[8] Dep't of Army, Pam. No. 25-1, Army Information Management Program—The Army Information Architecture (17 Sept. 1986).

[9] The ACMIS system was discussed in Perrin, *Military Justice Automation*, The Army Lawyer, Feb. 1986, at 24. More information on this system can be obtained from Major Gil Brunson, Information Management Officer, U.S. Army Legal Services Agency, Nassif Building, Falls Church, VA 22041-5013.

prepare, archive, and research documents, and to manage, manipulate, report and graphically portray data. Work will be done in either the stand-alone or network/terminal mode as necessary. PC software will perform word processing, database management, spreadsheet, graphics, automated legal research, and telecommunication functions as required in the course of daily law office operations. For both system security and workproduct security reasons, dependence on a single central processing unit (*i.e.*, minicomputer or mainframe) will be kept to a minimum. Decentralized processing will be emphasized.

Individual PCs will be supported by a variety of peripheral devices such as dot matrix printers, daisywheel printers, laser printers, typewriter/printers, optical character readers (OCR), modems, plotters, optical disks, and other devices as are suited to functional requirements. The exact configuration of the PC workstation and supporting peripheral devices will depend on the job being done. At OTJAG, for example, executive secretary workstations are supported by daisywheel typewriter/printers for short, letter quality work, and laser printers for multi-page, letter quality work. Action officer workstations are supported by small dot matrix printers for draft quality print. One workstation dedicated to automated legal research of internal and external databases is supported by an OCR, a plotter, and a dot matrix printer.[10]

Tier 2

As the PC (user) level is developed, individual PC workstations will be connected in an office automation network. At the hub of the network will be a device sized to each office's data processing requirements and physical layout. This device, be it a local area network (LAN) file server, a minicomputer, or the installation mainframe, will permit data to be shared by all users within an office and will provide communication between users on the network. In a Tier 2 network environment, an action officer will be able to create a document on his or her PC and, after entering the network, send the document to a supervisor for review, and then to a secretary for final typing. As the paper copy is dispatched to the addressee, the electronic copy is sent to the office database file where it can be stored for use at a later date.

Because networking solutions are dependent on office size and mission, no single Tier 2 solution has been prescribed for all JAGC offices. Nevertheless, in the minicomputer area, there are some standards, discussed later in this article, that must be followed if office networks are to operate in a manner compatible with LAAWS architecture.

Alternatives to minicomputer solutions at Tier 2 include PC networks developed around LAN file servers such as 3Com and Novell. These networks provide communication between workstations for purposes of file and data sharing. These LANs are limited in the number of PCs they can support without degrading system performance. Additionally, they are limited in the size of data storage devices that can be used. Accordingly, this solution is recommended for offices having less than ten persons.

A third solution is to use the installation mainframe computer to network the JAGC office PC workstations. The Director of Information Management (DOIM) in charge of installation data processing activities will be primarily responsible for evaluating this potential solution to your networking requirements.

Though Tier 2 is an important part of our system-building process, we must remember to initially focus attention on the PC level. As some have already found out, Tier 2 operations can be very labor intensive. Minicomputer networks generally require a significant amount of expertise to set up and administer on a daily basis.[11] Offices that have put their expectations in the performance of a minicomputer, bypassing the PC level, have been disappointed when no one could operate the minicomputer and the "dumb" terminals attached to it could not operate independently.

Tier 1

As office networks are completed, they will be connected to the LAAWS central computer for purposes of sending and retrieving information such as courts-martial reports, claims reports, legal assistance reports, and opinion files.[12] This mainframe computer, which will be operated by the Information Systems Command at a location to be identified, will be the repository for Corps-wide databases such as those now maintained for criminal law data, claims data, and administrative law opinions. The JAGC mainframe will also provide data links to other agencies and activities where data access or data interchange is required. Entry of data, research of databases, and retrieval of information from those databases will be available around the clock.

Local JAGC office automation networks will be connected to the LAAWS central computer by the Defense Data Network (DDN). This telecommunication capability is currently available to some offices. For others, a DDN gateway may become available either through their own office networking device, such as a Sperry 5000/80 minicomputer, or through the installation mainframe computer.

Automation Standards

Automation standards for LAAWS Tiers 2 and 3 were published by letter on 11 April 1986.[13] This letter, known as the LAAWS standards letter, was coordinated with the

[10] The OTJAG IMO has experience with the following printers: ALPS 2000, Epson FX85 and FX100; Epson LQ800; NEC Spinwriter; IBM Wheelwriter; QMS KISS Laser; IBM Pageprinter; Hewlett Packard ThinkJet; and IBM Proprinter. Automation coordinators are encouraged to consult with the OTJAG IMO on questions of printer capabilities.

[11] Network operations require someone to do such things as assign workstation identifications and passwords, design databases, and perform backups, troubleshooting, and liaison with maintenance and vendor personnel.

[12] A database containing synopsized administrative law, contract law, and criminal law opinions currently exists in the "J" File running on the OPTIMIS computer in the Pentagon. These opinions dating from 1980 are accessible to all who have an OPTIMIS account.

[13] Letter, DAJA–IM, Office of The Judge Advocate General, U.S. Army, to staff and command judge advocates, subject: JAGC Automation Standards, 11 Apr. 1986, *reprinted in* The Army Lawyer, June 1986, at 3.

Office of the Assistant Chief of Staff for Information Management.[14]

In establishing standards, the primary concern was that there be standards. The standard software and hardware products are not offered as the perfect solution for everything or everybody. Rather, they were chosen for their functional capability, availability, and widespread use in both the public and private sectors. DisplayWrite 3, for example, is the leading word-processing software package among the Fortune 1000 companies and is the standard for the Navy JAGC. Enable is the integrated software package of choice for the Air Force JAGC, the Internal Revenue Service, Dow Corning, and others. The IBM-compatible PC has become the de facto standard for the computer industry. Computers many of you have bought or will buy for home use fit this standard.

Earlier attempts at automation make it clear that we must have standards if we are to achieve a Corps-wide system. In the absence of standards, personnel will have to learn how to use new hardware and software every time they are reassigned. We cannot afford that loss of time and productivity. Therefore, we must resist the temptation to deviate from the standards. In cases where the standard products do not offer the required functional capability, approval to acquire or use non-standard products should be sought from the OTJAG IMO.

Software

There is a current saying that goes, "I like the Army automation standards because there are so many to choose from." Looking at the list of LAAWS standard software, one might think the same is true. That is not the case.

While not clearly stated in the standards letter, LAAWS software does have an order of priority. It is unrealistic to expect people to learn more than two or three different programs. It is also unnecessary that they do so. Therefore, the list of standard software products has been divided it into three levels of priority and support.

Level One software is that software that should be in every JAGC office and installed on every PC workstation. A working knowledge of Level One software should exist across the JAGC. On call assistance will be available from the OTJAG IMO at telephone number AUTOVON 227–8655 or commercial (202) 697–8655. LAAWS software modules will be written utilizing these software products.

Of the products listed in the 11 April 1986 standards letter, Enable and Displaywrite 3 are Level One programs.[15] Enable, an integrated package, offers word processing, spreadsheet, graphics, database management, and telecommunications capabilities. Enable is available on the Joint Micro Contract (Zenith) at a cost of $87.00 each. DisplayWrite 3 is a full-featured word processing program. It may be the primary or a backup word processing package depending on your location and the complexity of your word processing operations. It is a General Services Administration scheduled item available at a cost of about $250.00.

Other products mentioned in the standards letter are supported at Level Two. These products, such as dBaseIII, Supercalc 3, and ZyIndex, may be used to tailor individual workstations for tasks that surpass the capabilities of Level One software. Limited on call assistance will be available from the OTJAG IMO at the telephone numbers given above. Training will be the responsibility of the using office. No JAGC-wide proliferation of Level Two programs should be made without permission of the OTJAG IMO.

Level Three software includes that software not listed in the standards letter that is approved for individual office applications when Level One and Level Two software products will not suffice. Training will be the responsibility of the user. No assistance will be available from the OTJAG IMO. No JAGC-wide proliferation of Level Three software products will be made. Software products not falling within levels One, Two, or Three should not be acquired. If already acquired, they should be replaced with standard products as soon as possible. LAAWS software products will provide each user with the capability of doing most, if not all, of the daily tasks required of an individual automated workstation. Decisions to use a non-standard product threaten the integrity of the LAAWS and present the possibility of creating 200 different approaches to the same task. This will prove fatal to the system.

Software standards for the office network (Tier 2) environment have not yet been defined. A variety of programs, such as Q-Office, Sperry Office, and Office Power, are being considered. These programs run on the standard UNIX-based minicomputer and provide for intra-office messaging, calendar, spreadsheet, graphics, telecommunication, file transfer, text tile retrieval, and other functions. To the extent possible, office network software will be standardized in the same manner as software for PCs.

Hardware

The IBM-compatible PC is the hardware standard for Tier 3 of the LAAWS architecture. As stated in paragraph 3b, Annex I, Information Management Planning Guidance, these PC workstations should have at least 640K RAM, color monitor, at least one 5¼" floppy disk drive and one 20 megabyte (or larger) hard disk drive.[16] It is highly recommended, though not required, that the PC utilize Advanced Technology (AT), *i.e.*, the Intel 80286 microprocessor. Several types of PC AT-compatibles are capable of satisfying the IBM-compatibility requirement. OTJAG has acquired or tested ten different PCs, all of which run the LAAWS standard software products. Of the models tested, the Zenith Z–248 PC is recommended as the best value. The Zenith PC is available on the Joint Micro Computer Contract, contract #F19630–86–D–002. A fully

---

[14] The LAAWS automation standards are in harmony with the Army automation standards as stated in Dep't of the Army Message R 112008Z Jun 86, subject: Standards for Army Information Systems Equipment.

[15] Though the LAAWS standards are expected to remain stable during a five to eight year life cycle, upgrades in software will likely occur. Enable version 2.0 is currently being evaluated as a replacement for Enable versions 1.1 and 1.15. DisplayWrite 4 is being evaluated as a possible replacement for DisplayWrite 3. The object is to stay in touch with emerging technology without being a test site for every new product.

[16] Letter, DAIM–ADP, Office of the Assistant Chief of Staff for Information Management, subject: Information Management Planning Guidance, 14 Jan. 1987. Your separate IMP initiatives should follow the guidance found in Annex I. The LAAWS IMP initiative number is JA86001.

configured PC, monitor, modem and Enable and DisplayWrite 3 software will cost approximately $2500.00. Printers, plotters, OCRs, and other peripheral devices will be acquired in accordance with the needs of each office.

The hardware standards for Tier 2 are not easily defined. The type of computer device required for networking individual workstations depends on the number of workstations, the dispersion of those workstations, and the information management requirements of the individual office. In those cases where an office level minicomputer is required, the standard is as stated in the 11 Apr 86 standards letter, *i.e.*, a 16-bit, or larger, central processing unit capable of running version V.2 of the UNIX operating system. The unit should also have a gateway to Standard Network Architecture (SNA) and have Document Interchange Architecture/Document Content Architecture (DIA/DCA) with standard applications interface conventions.

A variety of UNIX-based machines are currently in use. They include Intel 310s, Sperry 5000/80s, CCI Power 6s, among others. The Sperry minicomputer has been successful in its integration of the Zenith Z–248 PCs and Wyse PCs as intelligent terminals to the network. It is recommended for those offices with a requirement for networking ten or more workstations.

Personnel

The success of the LAAWS project rests in the hands of the personnel who take the actions necessary to make the system a reality. They are the ones who will define, justify, and acquire system components. They will oversee the installation, training, maintaining, supplying, and administrating. Just as surely as technology brings change, we must carefully examine our staffing with an eye toward shifting personnel resources into automation support positions. Typing pools of today may become the data system support centers of tomorrow.

Make no mistake, "turn-key," "user-friendly," and "easy installation" are relative terms. The fact is, the process of automating is not easy, but the payoff is great. In some ways, automating is like moving a giant stone. To make it move just a little takes people, time, and energy. As the stone starts to move, it moves slowly. Then, it achieves its own momentum and produces its own energy.

Security

In setting up our office automation systems and individual workstations, we must be conscious of the risks we are taking. We need to go through the "what if" drill of a risk analysis to ensure that we have minimized the risk of lost data, unauthorized use of data, and mismanagement of data. Chapter 10 of Army Regulation 380–380[17] sets forth guidelines for accreditation of automated systems. Automation coordinators should make plans to complete this accreditation process as part of their automation planning. Standing operating procedures need to address issues such as processing of classified data, check out of portable computers, and assignment and duties of terminal area security officers (TASO).

Conclusion

In the past year and a half, the JAG Corps has moved a considerable distance toward our automation objectives. In accordance with Major General Overholt's policy guidance, most of us have appointed automation coordinators, studied our requirements, and made plans for acquiring needed system components.[18] Many of us have obtained approvals to acquire computers and software, and many have fought and won the battle for funds to acquire some, if not all, of what we need. Some have even achieved the model configuration for the fully automated law office. Whatever stage you happen to be at, you are not alone. Let your DOIM and your commander know what is going on JAGC-wide. Make them aware of what automation does to enhance our ability to deliver timely, complete, and quality legal service to the military community. Let them know that by building our system from the ground up following Corps-wide standards, we will have the strongest and most productive automation system in the Army.

[17] Dep't of Army, Reg. No. 380–380, Security—Automation Security, chap. 10 (8 Mar. 1985).

[18] Policy Letter 85–4, Office of The Judge Advocate General, U.S. Army 23 Oct. 1985, *reprinted in* The Army Lawyer, Dec. 1985, at 4.

The Advocate for Military Defense Counsel

Prosecutorial Power, Abuse, and Misconduct

Captain William J. Kilgallin
Defense Appellate Division

Introduction

The civilian expression "prosecutor" refers to the person who represents the government throughout a criminal procedure. He or she may be known as the "district attorney", the "state's attorney," or the "United States Attorney". In the practice of military law, the trial counsel is roughly equated with the prosecutor. The power of any prosecuting attorney is very broad, and his or her decisions during the course of a criminal investigation and prosecution will often have a devastating impact on the lives and careers of those accused of crimes. This vast, often unchecked power must be used properly in order that the prosecutor's true goal, to serve both society and justice, can be met. The prosecutor is

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[1]

To a large degree, prosecutors can claim that they are only doing a job, assisting society in apprehending and punishing criminal offenders. It can be said that a prosecutor does not make the law, he or she only follows it. The reality of the matter is quite different. "The law is written by legislators, interpreted occasionally by appellate courts, but applied by countless individuals, each acting largely for himself. How it is applied outweighs in importance its enactment or its interpretation."[2]

Of course, the military is not a sovereignty, but the mission of military justice is to ensure that justice is done. In our military practice, the power of the prosecutor is diluted to some degree. Unlike his or her civilian counterparts, the trial counsel does not decide who to prosecute; the court-martial convening authority does.[3] Nor does the trial counsel decide at what level any particular disciplinary problem will be resolved. The trial counsel, with a battery/company commander, a battalion commander, and the staff judge advocate, makes recommendations to the summary, special, or general court-martial convening authority. It is arguable then that much of the concern expressed in the civilian practice regarding prosecutorial misconduct is inapplicable in an examination of the military practice.

Experience shows, however, that even with the control placed on trial counsel by this limited charter, the exercise of his or her power provides ample opportunity for conscious or inadvertent overreaching. Although trial counsel "merely" provides "advice" to the convening authority, along with numerous commanders, in reality, once a trial counsel has earned the respect of the commanders in the community, his or her recommendations more often than not become their recommendations. In the vast majority of cases, the local commanders do what the trial counsel recommends, and the convening authority does what the subordinate commanders recommend. The trial counsel's advice on which matters to refer to court, which level of court is appropriate, which accused should get a pretrial agreement, and what the terms of such an agreement are, often becomes one and the same with the "independent" determinations of the convening authority. This is not necessarily an inappropriate role for trial counsel. But the reality that a trial counsel's power is exerted throughout the entire criminal process must be recognized, because to a large degree his or her powers are similar to those of civilian counterparts. Therefore, it is vital that trial defense counsel remain vigilant for any abuse in the exercise of that power, throughout the entire course of a client's case. This article will discuss various opportunities in the court-martial process where "prosecutorial misconduct" may take place.

The Decision to Charge

The power of the trial counsel in making decisions to charge is as strong as any other figure involved, except perhaps the convening authority. The trial counsel's discretion in who to charge and what to charge is often given only limited review by his or her superiors. In general, the trial counsel examines the daily "blotters," Military Police (MP) reports and Criminal Investigation Command (CID) reports of investigation, discusses an incident with law

[1] United States v. Berger, 295 U.S. 78, 88 (1934).

[2] Baker, *The Prosecutor-Initiation of Prosecution*, 23 J. Crim. L. & Criminology, 770, 796 (1933).

[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 601 [hereinafter R.C.M.].

enforcement officials, decides what offense a soldier should be "titled" for, and begins the process of referral of charges through consultation with the accused's command. There is little supervisory assistance or review in this.

A trial defense counsel should first determine if the client has been singled out for selective prosecution. Discriminatory and arbitrary enforcement of the law violates equal protection.[4] There are three elements an accused must establish to take advantage of this defense: other persons similarly situated and equally subject to prosecution were not prosecuted; the accused was singled out as a result of a deliberate, purposeful decision; and the decision to prosecute the accused was based on arbitrary, invidious or impermissible considerations.[5]

Trial defense counsel must first examine the facts of the case to determine if they fit within these standards. The courts are very demanding in determining what constitutes "similarly situated."[6] Persons who commit different offenses are not similarly situated.[7] People who commit the same offenses, but to different degrees, are not similarly situated.[8] Trial defense counsel should refer to specific statistical data from the particular jurisdiction to illustrate that similarly situated soldiers were not charged.

Next, trial defense counsel must be able to show that the client was singled out for prosecution. Defense counsel must be able to show that the trial counsel *was aware* of these other soldiers and chose not to prosecute them.[9]

Finally, trial defense counsel must be able to show that the decision to prosecute this accused was based on an impermissible motive, *i.e.*, a constitutionally prohibited reason, such as race[10] or sex.[11] When factors that support such a claim are found, defense counsel should seek dismissal of the charges in a pre-trial session. If such information does not come to light until after conviction, it should be raised after trial for habeas corpus relief.[12]

Once the defense makes a prima facie case that there has been selective prosecution, the burden shifts to the government to rebut the inference by compelling evidence.[13] Trial defense counsel should also be aware of impermissible prosecutorial vindictiveness in charging. For example, if the defense can make a showing that, due to the exercise of the right to counsel, forum or motions, an accused is subjected to more severe charging and punishment, this constitutes prosecutorial misconduct.[14]

The Article 32 Investigation[15]

Grand jury proceedings in the civilian community have been called one of the most powerful instruments in the arsenal of the prosecutor. Historically an independent body standing between the citizen and the state, the grand jury today resembles a prosecutorial agency, possessing an awesome range of powers, and emphasizing secret interrogation and accusation as opposed to exoneration.[16] It is a secretive setting, closed to all but the prosecutor, the jurors, and the witness. The prosecutor determines who is called and what is asked. No judges or defense counsel are present.[17] Commenting on the practice of questioning individuals without allowing counsel to be presenting, Judge Learned Hand stated, "save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination."[18]

The military justice system provides many more protections to the accused in an Article 32 investigation than the grand-jury proceeding provides to a civilian. The soldier is represented by a lawyer and can call witnesses to dispel the government's allegations.[19] The Article 32 hearing is also recognized as a legitimate tool of discovery by the defense.[20] While it seems that an Article 32 investigation thus provides fewer opportunities for prosecutorial misconduct than a civilian grand-jury proceeding, misconduct by trial counsel can occur.

A common error that occurs in the course of an Article 32 investigation, and one very difficult to discover and avoid, is ex parte communications between the Article 32 investigating officer (I.O.) and members of the prosecution. The I.O. may seek legal advice during the course of his or her investigation, but he or she "may not obtain such advice from counsel for any party."[21] Of course, when there is a question of procedure or law, the I.O. will naturally look to the government representative for resolution of that

[4] Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

[5] United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

[6] *See* United States v. Garwood, 20 M.J. 148, 154 (C.M.A. 1985).

[7] United States v. Cantu, 557 F.2d 1173 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978).

[8] United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973).

[9] Oyler v. Boyles, 368 U.S. 448 (1962).

[10] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[11] Commonwealth v. King, 374 Mass. 5, 372 N.E.2d 196 (1977).

[12] Trial defense counsel should contact the Defense Appellate Division for assistance in this regard.

[13] United States v. Falk, 479 F.2d 616, 624 (7th Cir. 1973)

[14] North Carolina v. Pearce, 395 U.S. 711 (1969); *see also* United States v. Hollywood Motor Car, 646 F.2d 384 (9th Cir. 1981) (where government officials threatened new counts to the indictment if defendants pursued motions for change of venue, court reversed and remanded for dismissal).

[15] Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1982) [hereinafter UCMJ].

[16] B. Gershman, Prosecutorial Misconduct § 2.1 (1985).

[17] *See* M. Frankel & G. Naftalis, The Grand Jury 21–23 (1977); *see also* Note, *Grand Jury Proceedings: The Prosecutor, The Trial Judge, and Undue Influence*, 39 Chi. L. Rev. 761 (1972).

[18] United States v. Remington, 208 F.2d 567, 573 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 347 913 (1954).

[19] UCMJ art. 32(b); R.C.M. 405.

[20] R.C.M. 405(a) discussion.

[21] R.C.M. 405(d)(1) discussion.

question. It is therefore incumbent on the government representative to refrain from answering and to direct the I.O. to an assigned legal advisor, an attorney with no prosecutorial interest in the case. Because an Article 32 investigation is judicial in nature, the I.O. must conduct himself or herself as a judicial officer.[22]

In *United States v. Payne,*[23] the Court of Military Appeals examined this very scenario. A legal advisor was appointed to assist the I.O. The I.O. chose instead to continue to confer with the government representative, even after being apprised of the potential problems. The I.O felt that the government representative was more familiar with the case and would not have to read the case file in order to give advice. The Court of Military Appeals found that, however "laudable" his reasons were, his ex parte discussions with the government representative were violative of his role as a judicial officer and created a presumption of prejudice so as to make reversal obligatory in the absence of clear and convincing evidence to the contrary.[24] While the court viewed the communications as misconduct by the I.O., realistically it is the government representative who knows or should reasonably know that such communications are improper. The participation in such conversations by government representatives more clearly constitutes "misconduct." In *United States v. Brunson,*[25] the Coast Guard Court of Military Review found that similar ex parte conversations between the government representative and the I.O prejudiced Brunson's rights and determined that the record did not contain the clear and convincing evidence needed to overcome the presumption of prejudice created by the improper communications. The court therefore set aside the findings and sentence.[26]

Trial defense counsel should consider making a request, as soon as the Article 32 I.O. is appointed, that the I.O. not conduct any ex parte communications with any government representative during the course of the investigation, that he or she give adequate notice of the time and location of any conversations with his or her legal advisor, and that he or she allow both counsel to be present during such sessions. Trial defense counsel should also request that the I.O. place the number and nature of any "off-the-record" conversations or consultations in the report of investigation. The danger of not controlling ex parte communications is great, because "[W]hen the prosecutor's identity is clothed with appointment as the investigating officer's own attorney, he is placed in a position in which his recommendations and advice will surely be accorded unfair attention."[27]

Other areas of concern in which misconduct by the government representative can occur at the Article 32 investigation include improprieties in interrogation of witnesses, undermining the legal safeguards of witnesses, and using "tainted" evidence that would be inadmissible in trial. Such conduct can arise as application of the Military Rules of Evidence is "relaxed" during the investigation.[28] Trial defense counsel should be aware of the limitations on presentation of alternative forms of testimony or evidence at an Article 32 hearing.[29]

The trial defense counsel should place any objections to the Article 32 investigation on the record. If the objection is not resolved to his or her satisfaction, the defense counsel should raise the issue of the impropriety of the pretrial investigation to the convening authority within five days after he or she receives the completed Article 32 report.[30] If the convening authority does not remedy the situation, counsel should again raise the issue at a pretrial session before the military judge. Failing to raise the issue at any of these three stages may result in waiver. As in many areas, it is vitally important that trial defense counsel ensure that sufficient evidence is placed on the record to allow appellate counsel and appellate courts to review the decisions made by the I.O., the staff judge advocate, or the trial judge.

Discovery

At trial, defense counsel occasionally become aware of evidence that should have been discovered during the pretrial stage. Such evidence would often have affected trial strategies, had it been made available to defense counsel before trial. In *Brady v. Maryland,*[31] the Supreme Court fashioned a prosecutorial duty to disclose evidence favorable to the defendant. In *Brady,* the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[32] The Supreme Court reaffirmed this ruling in *United States v. Agurs.*[33]

Nondisclosure violates a client's due process rights because the result of the trial runs the risk of being inaccurate, *i.e.,* the verdict and/or punishment was the result of an inaccurate or mistaken account of the facts leading to trial.[34]

---

[22] *See* United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959).

[23] 3 M.J. 354 (C.M.A. 1977).

[24] *Id.* at 357.

[25] 15 M.J. 898 (C.G.C.M.R. 1982).

[26] The court noted that the record could not overcome the presumption that appellant was prejudiced by the improper investigation.

[27] United States v. Young, 13 C.M.A. 134, 141, 32 C.M.R. 134, 141 (1962).

[28] R.C.M. 405(i) provides that "The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, and Section V—shall not apply in pretrial investigations under this rule."

[29] R.C.M. 405(g)(4), (5).

[30] R.C.M. 405(j)(4).

[31] 373 U.S. 83 (1963).

[32] *Id.* at 87.

[33] 427 U.S. 97 (1976). *Agurs* also imposes an obligation to disclose evidence that would raise a reasonable doubt as to guilt, regardless of a defense request.

[34] To sustain a *Brady* challenge, the court must find that the prosecution actually suppressed certain evidence, that the evidence was favorable to the accused, and that the suppressed evidence was material to the guilt or punishment of the accused. 373 U.S. at 87.

Defense counsel must be vigilant in ensuring that counsel and the client have as much information as possible to prepare for trial. This requires that defense counsel hold the prosecution to full disclosure even when approaching a guilty plea. The theory that guilty pleas represent the result of full and fair negotiations or a mutuality of advantage is simply not a reflection of reality. Plea negotiations are a necessity in many criminal jurisdictions. A heavy caseload often makes "dealing" imperative. It has been said that the pressures on defendants to plea bargain is overwhelming, and many of the inducements to plead guilty bear no relationship to the defendant's actual guilt under the law.[35] Regardless of the prosecutor's reason for entering into a plea agreement, an accused's decision to plead guilty is often most influenced by an appraisal of the prosecutor's case. Reduced disclosure by the prosecutor results in a reduced bargaining position for the accused. This is also an important consideration when a sentence is challenged on appeal, as the Court of Military Appeals and the Army Court of Military Review consider an appellant's sentence limitation in a plea agreement as a standard for determining the reasonable fairness of a sentence.[36]

Among the material that the trial counsel has a duty to disclose to the defense is the existence of evidence known to the trial counsel that reasonably tends to: negate the guilt of the accused; reduce the degree of guilt of the accused; or reduce the punishment received by the accused.[37] This is a continuing duty of the trial counsel;[38] even after responding to the defense discovery request, the trial counsel has an affirmative duty to provide any such evidence that subsequently arises.

The Court of Military Appeals has expressed a "concern for the conduct of trial counsel in withholding from the defense certain information impacting upon both the credibility and the competence of a key prosecution witness to the offense charged."[39] In *United States v. Brickey,* the key government witness in a drug prosecution clearly gave the impression that his own prior drug use had been limited to use of marijuana, and that his use had terminated before he was a CID source and became involved with the purchase of methamphetamines from Brickey. Trial counsel knew that the witness had in fact been hospitalized for an overdose of drugs since his involvement with Brickey. The Court of Military Appeals held that it was improper for the trial counsel to withhold this information and that his failure to bring this information to the attention of defense counsel prejudiced Brickey. Based on this misconduct, the conviction was reversed. It should be noted that the test applied for prejudice is determined by the specificity of the defense discovery request.[40]

In *United States v. Eshalomi,*[41] the Court of Military Appeals examined the duty of the prosecution to provide impeachment evidence. The court found that the deliberate withholding of requested information concerning an alleged rape victim's medical and psychological history as well as her prior inconsistent statement greatly impeded the ability of the defense to impeach her as a witness. The court found that such nondisclosure "probably"[42] affected the outcome of the trial. The court noted the opinion of Justice Blackmun in *United States v. Bagley*[43] that an incomplete response to a discovery request has the effect of misrepresentation of fact, as it implies that no such evidence exists and, in reliance on that implied response, the defense might abandon lines of independent investigation, defenses, or trial strategies that it might otherwise have pursued.[44]

Other potential areas of government misconduct include the false assurance by a government representative that an accused's full cooperation will result in his or her not being brought to trial,[45] and the government's use of known false evidence. This latter action has been condemned as "incompatible with the rudimentary demands of justice and . . . a corruption of the truth seeking process."[46]

Voir Dire

The discriminatory use of peremptory challenges during the selection of panel members has come under additional scrutiny since the Supreme Court's recent decision in *Batson v. Kentucky.*[47] In *Batson,* the Court examined the long struggle to remove racial discrimination from the courtroom, and explained its rationale as follows:

> Equal protection guarantees the defendant that the state will not exclude members of his race . . . on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors. . . . By requiring trial courts to be sensitive to peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our nation, public respect for our criminal justice and the rule of law will be strengthened if we insure that no citizen is disqualified from jury service because of his race.[48]

---

[35] *See generally* D. Maynard, Inside Plea Bargaining, 196–97 (1984).

[36] *See* U.S. v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979).

[37] R.C.M. 701(a)(6).

[38] R.C.M. 701(d). This is consistent with the Model Code of Professional Responsibility DR 7–103(b) (1980).

[39] United States v. Brickey, 16 M.J. 258, 259 (C.M.A. 1983).

[40] *See* United States v. Agurs, 427 U.S. 97 (1976), for a discussion of three examples of discovery requests and the different tests applied by the Supreme Court. *Cf.* United States v. Bagley, 105 S. Ct. 3375 (1985) (suggesting a single standard of materiality).

[41] 23 M.J. 12 (C.M.A. 1986).

[42] *Id.* at 28.

[43] 105 S. Ct. 3375 (1985).

[44] *Eshalomi,* 23 M.J. at 23.

[45] Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982).

[46] United States v. Fuentes, 8 M.J. 830, 832 (A.C.M.R. 1980) (*citing Agurs*).

[47] 106 S. Ct. 1712 (1986).

[48] *Id.* at 1717, 1728.

The *Batson* Court ruled that a defendant need no longer show "systematic" discriminatory use of peremptory challenges. Rather, he or she can now make a prima facie showing based solely on the facts and circumstances of the individual case. This prima facie showing will raise an inference of "purposeful discrimination," triggering a requirement for the prosecution to articulate a neutral explanation for the use of the challenge. The trial court will then have a duty to determine if the defendant has established purposeful discrimination.[49]

The Army Court of Military Review recently decided the first military case attacking a trial counsel's peremptory challenge on *Batson* grounds.[50] The court was reluctant to apply *Batson* to trials by court-martial, stating "[i]t is unlikely that Batson would apply to trials by court-martial, primarily because our system allows only one peremptory challenge—a situation which simply does not permit the government an opportunity to dramatically change the composition of a court-martial (jury) through challenge."[51]

Defense counsel must therefore be prepared to make a record that can overcome such reluctance. Counsel should become familiar with *Batson*, be aware of the racial composition of the court-martial panels, be prepared to make timely objections to peremptory challenges, and place all relevant facts and circumstances on the record to preserve the issue for appeal.

Argument

Although the most frequently alleged "error" on the part of all prosecutors, including military trial counsel, the improper argument is an elusive error. Some civilian courts have permitted references to the accused as "a fiendish ghoul,"[52] "crooks, viruses and germs,"[53] "a subhuman man with a rancid rotten mind,"[54] "a mad dog who did not deserve to live,"[55] and "trash."[56] These were allowed as reasonable comments on the evidence. Misconduct does include imputing violence to the accused, appealing to racial prejudice or to national pride or patriotism, commenting on an accused's failure to testify or call witnesses, and improper remarks about the defense counsel.[57] Nor can a prosecutor express personal beliefs about the evidence.[58]

The military courts have also been critical of such misconduct. The trial counsel's argument that, "in my mind there is no doubt whatsoever"[59] of an accused's guilt, constituted plain error requiring reversal. In *United States v. Falcon*,[60] trial counsel's personal comments on the evidence regarding the similarities of the printing on a piece of evidence and his comments on the weakness of the evidence of alibi, constituted using his training and experience in evaluating the evidence. The court found that, in effect, he testified as an expert witness that he personally found the government's evidence convincing and the defense evidence unworthy of belief.

Other improper arguments include the trial counsel's comment purporting to speak for the convening authority or commander. Where the thrust of the trial counsel's argument was that, by their recommendations and referral of the case to a bad-conduct discharge special court-martial, the commanders and convening authority determined that it was suitable for the government to request the maximum punishment, the Army Court of Military Review found error, but determined that the error was waived by the trial defense counsel's failure to object.[61]

Asking the sentencing authority to place itself in the position of the victim, the victim's spouse,[62] parents,[63] or brother[64] also gives rise to error. Asking the military judge whether he would like the accused to walk the streets in his community was also deemed error.[65] The aim of such limiting of the trial counsel's argument is the prevention of an invitation to the sentencing authority to "cast aside the objective impartiality demanded of him . . . and judge the issue from the perspective of personal interest."[66]

Conclusion

Trial defense counsel should be aware of these areas of possible prosecutorial misconduct and should be ready to make timely objections when such misconduct occurs. Counsel should also make appropriate motions for dismissal of charges, mistrials, or remedial instructions, depending on the type of misconduct. Counsel should understand that the courts are imposing a strict application of the doctrine of waiver. Failure to object to the misconduct will often leave the client without recourse on appeal.

---

[49] *See* Cardillo, *Government Peremptory Challenges*, The Army Lawyer, Aug. 86, at 63; *see also* Kilgallin, *Discriminatory Use of Peremptory Challenges*, The Army Lawyer, Oct. 86, at 66.

[50] United States v. Santiago-Davila, CM 447830 (A.C.M.R. 6 Aug. 1986).

[51] *Id.*, slip op. at 2.

[52] Cronnon v. Alabama, 587 F.2d 246, 251 (5th Cir.), *cert. denied*, 440 U.S. 974 (1979).

[53] United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971).

[54] United States v. Cook, 432 F.2d 1092, 1106–08 (7th Cir. 1970).

[55] Miller v. State, 226 Ga. 730, 731, 177 S.E.2d 253, 254 (1970).

[56] Roberts v. State, 571 P.2d 129, 136 (Okla. Crim. App.), *cert. denied*, 434 U.S. 957 (1977).

[57] *See generally* B. Gershman, *supra* note 16, § 10.5.

[58] *See* ABA Standards for Criminal Justice § 3–5.8(b) (2d ed. 1982); Model Code of Professional Responsibility DR 7–106(4) (1980).

[59] United States v. Knickerbocker, 2 M.J. 128, 129 (C.M.A. 1977).

[60] 16 M.J. 528, 531 (A.C.M.R. 1983).

[61] United States v. Kiddo, 16 M.J. 775, 776 (A.C.M.R. 1983).

[62] United States v. Shamberger, 1 M.J. 377, 379 (C.M.A. 1976).

[63] United States v. Wood, 18 C.M.A. 291, 296–97, 40 C.M.R. 3, 8–9 (1969).

[64] United States v. Bomberg, 17 C.M.A. 401, 38 C.M.R. 199 (1968).

[65] United States v. Nellum, 21 M.J. 700 (A.C.M.R. 1985).

[66] *Wood*, 18 C.M.A. at 296, 40 C.M.R. at 8.

The Reprimand That Could Not Be

On 19 December 1986, the Army Court of Military Review decided *United States v. Gooden.*[1] The court set aside the action because the approved sentence, which included a reprimand, exceeded the terms of the pretrial agreement.

The court first decided that the error created by the military judge's failure to determine whether a reprimand could be approved under the terms of the pretrial agreement[2] was harmless because a reprimand was such miniscule punishment. The court was more troubled by the execution of the reprimand in the convening authority's action because the pretrial agreement provided for no punishment in excess of enumerated punishments, and also contained no language allowing the approval of "any other lawfully adjudged punishment."[3]

Government appellate counsel urged the Army court that under Rule for Courts-Martial 1106(f)(6),[4] the error was waived by trial defense counsel's failure to comment upon the issue either at trial or in his post-trial submissions. The court rejected that argument and found that execution of the reprimand was plain error.[5]

Trial defense counsel should be cautioned, however, that the court declined to apply waiver because it found that the error, an approved sentence in excess of the agreed-upon limits, was a part of the convening authority's action.[6] Usually, trial defense counsel are rebuked for omissions of critical information in post-trial submissions to the convening authority. Recently, the Army Court of Military Review found that it was error for the staff judge advocate not to inform the convening authority that the accused had spent nine days in pretrial confinement, but such error was waived by the trial defense counsel's failure to comment on the confinement in post-trial submissions.[7] Indeed, in an earlier case where both the staff judge advocate and the trial defense counsel failed to acknowledge in post-trial submissions that the accused had been under pretrial restraint and that the military judge had recommended suspending the bad-conduct discharge, the court's decision was much harsher; the court found ineffective assistance of counsel.[8]

United States v. Gooden is a reminder to trial defense counsel to "pay attention to detail." However minute a punishment, if its approval is precluded by the terms of the pretrial agreement, trial defense counsel should point out the discrepancy at trial, and if needed, in post-trial submissions. Not to do so risks creating appellate error that may not always be resolved as fortuitously for the client as it did for Sergeant Gooden. Captain Lida A. S. Savonarola.

Jurisdictional [De]Fault

The aggressive advocacy of Fort Riley trial defense counsel has resulted in the recent U.S. Army Court of Military Review opinion of *United States v. Harrington.*[9] The Army court set aside the findings of guilty and the sentence because the court-martial was convened by an officer who was not empowered to do so, resulting in imperfect jurisdiction.

While the commander of Headquarters, Fort Riley (who was also the commander of the 1st Infantry Division (Mechanized)) was participating in REFORGER, the deputy post commander, as "acting commander," referred Harrington to trial by general court-martial.[10] This referral was made notwithstanding regulatory provisions directing that the next senior Army member assume command when the commander is temporarily absent.[11] The deputy post commander was not the senior officer in the command because the staff judge advocate was senior to him by date of rank.[12]

This is not to say that exercise of command by the deputy post commander would have been improper had the command complied with Army regulations in his appointment. To place a junior member in command, the request for appointment must be submitted to the next higher commander having authority under the regulation to make such appointments.[13]

Although the central emphasis of the court's opinion is the requirement that the government follow its own regulations, there are other important lessons for the judge advocate. A judge advocate may serve in a command position, and cannot voluntarily relinquish the right to take command.[14] The court made it clear that the role of the staff judge advocate is not so "important that the command should not be deprived of his services" and that the staff

---

[1] 23 M.J. 721 (A.C.M.R. 1986).

[2] *Id.* at 722–23; *see* United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

[3] *Gooden*, 23 M.J. at 723.

[4] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1106(f)(6)

[5] *Id.*

[6] *Id.*

[7] United States v. Holman, 23 M.J. 565, 567 (A.C.M.R. 1986).

[8] United States v. Roberts, SPCM 20901 (A.C.M.R. 20 Feb. 1986).

[9] United States v. Harrington, CM 446500 (A.C.M.R. 28 Jan. 1987).

[10] *Harrington*, slip op. at 2.

[11] Dep't of Army, Reg. No. 600–20, Personnel—General Army Command Policy and Procedures, para. 3–4*a* (15 Oct. 1980) [hereinafter AR 600–20].

[12] *Harrington*, slip op. at 2.

[13] *Id.*, slip op. at 5; AR 600–20, para. 3–3c.

[14] *Harrington*, slip op. at 4. Note, however, had the staff judge advocate been incapacitated, or otherwise ineligible, the result of this case may very well have been different. *Id.; see also* Dep't of Army, Reg. No. 27–1, Legal Services—Judge Advocate Legal Services, para. 1–9 (1 Aug. 1984).

judge advocate's advisory role does not conflict with the responsibilities of convening authority.[15]

United States v. Harrington is but another example of trial defense counsel fulfilling their obligation to police the system so it will not impinge on the rights of their soldier clients. Captain Kathleen A. VanderBoom.

Probative Value and Unfair Prejudice

The concept of legal relevance under Military Rule of Evidence 403 has been further defined in two new cases from the Court of Military Appeals. Because the Rule calls for a case-by-case balancing of the probative value and the danger of unfair prejudice of relevant evidence, it is important to be aware of the Rule's recent application.

In *United States v. Brown*,[16] appellant was convicted of a single specification of distributing marijuana. At trial, he testified on the merits and denied any involvement in the drug transaction. Trial counsel was permitted, over defense objection, to cross-examine appellant on a positive urinalysis that resulted in an Article 15[17] for marijuana use. The Court of Military Appeals held that the evidence that appellant had a positive urinalysis was improperly admitted under Mil.R.Evid. 403. Although the evidence was relevant, the Court believed it would tend to convince the members that appellant was a bad person and therefore had committed the offense. The court characterized the link between the use of marijuana and the opportunity to distribute marijuana as "tenuous at best."[18]

The Court of Military Appeals struck a different balance in *United States v. Yanke*.[19] Here, appellant was convicted of the unpremeditated murder of his eight month old son by suffocation. In aggravation, the government was permitted, over defense objection, to use a photograph of the child after death to assist a physician in testifying that the victim was of normal development and would have struggled against the acts of appellant. The court held that the evidence was admissible for a legitimate purpose (the circumstances surrounding the death were a proper subject for aggravation) and thus relevant.[20] Furthermore, the court did not find the evidence unfairly prejudicial in light of the government's limited purpose on sentencing.

In making a Rule 403 objection at trial, defense counsel should first determine if the prejudice perceived is a result of the evidence itself, or merely the form in which the evidence is offered. If the latter, defense counsel should suggest alternative methods to the court in order to admit the evidence in a less damaging manner. One possibility is to stipulate to the evidence and thereby avoid its presentation to the members in the more prejudicial form. By so doing the defense will provide the military judge with an easier balance to strike under Rule 403. Captain Debra D. Stafford.

Peremptory Challenges

Here is an entirely speculative heads-up for trial defense counsel. The scenario: you have exercised your one and only peremptory challenge and, for whatever reason, new members are appointed to the panel.[21] More members are detailed and there is one you want to pull off but you cannot win a challenge for cause; you want to have another peremptory challenge. The law has been clear: there is no entitlement under any circumstances to more than one peremptory challenge.[22] Although *Holley*, the lead case from the Court of Military Appeals on the issue, is seemingly dispositive of any question about additional peremptory challenges, the Court of Military Appeals is *granting* consideration of this issue.[23] Precisely what the outcome will be is simply not predictable. Although stare decisis would seem to dispose of the issue, Chief Judge Everett wrote a strong dissent in *Holley* and that dissent may be a road map to the course the court will take.[24] In the meantime, if you are faced with newly detailed members after you have used your peremptory challenge, go ahead and ask for another. While the law is against you now, you will be making your record for the appellate courts in the event *Holley* is modified or reversed. Captain Annamary Sullivan.

Reasonable Expectation of Privacy

Does a soldier have a reasonable expectation of privacy in a locked drawer of a government desk in which he has personal items stored? The Court of Military Appeals recently examined this issue in *United States v. Muniz*.[25] The court held that there was no reasonable expectation of privacy in the contents of a government-owned credenza drawer and the search of the drawer was reasonable under the emergency exception to the fourth amendment.

In *Muniz*, an Air Force captain, stationed in Texas, was convicted of signing a false official document, making a false statement to a noncommissioned officer, and drunk driving. The accused signed a false leave form stating he would be in Puerto Rico and told his first sergeant he needed to take care of his ailing mother there. Muniz instead went to England to enjoy an extra-marital affair with a female Air Force captain. While the accused was in England, his daughter became ill and required emergency

---

[15] *Harrington*, slip op. at 4.

[16] 23 M.J. 149 (C.M.A. 1987).

[17] Uniform Code of Military Justice art. 15, 10 U.S.C. § 815 (1982) [hereinafter UCMJ].

[18] *Brown*, 23 M.J. at 150.

[19] 23 M.J. 144 (C.M.A. 1987).

[20] *Id.* at 145.

[21] The most likely reason is that after challenges have been granted, the number of members has fallen below the statutory minimum. *See* UCMJ art. 16.

[22] United States v. Holley, 17 M.J. 361 (C.M.A. 1984); *see* UCMJ art. 41(b).

[23] *See, e.g.*, United States v. James, CM 55912/AR (29 Jan. 1987), granting petition for grant of review on issue of "whether the military judge erred by failing to allow additional peremptory challenges after additional members were detailed."

[24] *Holley*, 17 M.J. at 371–74 (Everett, C.J., dissenting).

[25] 23 M.J. 201 (C.M.A. 1987).

surgery. Muniz had told his wife that he was on a temporary duty (TDY) assignment. His wife contacted his commander and impressed the urgency of contacting her husband. Efforts by his commander and first sergeant to locate the accused in Puerto Rico were, of course, unsuccessful. After some detective work, the commander and first sergeant discovered that the accused had received a number of letters with an APO return address. Thinking that there might be some connection between the unexplained absence and the letters, they decided to look in the accused's separate office for the letters. They jimmied the lock on the drawer of the credenza and found several letters with the same APO return address. They copied down the address but did not remove the letters. Through this address, they were able to contact Muniz.

The court discussed the relationship of the fourth amendment to the military. Under the present interpretation of the fourth amendment by the United States Supreme Court, an accused must demonstrate a "legitimate expectation of privacy" in the place searched. The fact that the credenza was government property did not exclude the possibility that Captain Muniz may have had a legitimate expectation of privacy in its contents, although there is normally a greater expectation of privacy in one's own property than in property owned by the government.

The court relied on several Supreme Court cases in holding that the commander was acting as a business supervisor and not in a law enforcement capacity, and, therefore, had lawful access to the government property in the accused's constructive custody.[26] The court further explained that the government property was the drawer itself, and, assuming the entry was legitimate, the address on the envelope could be seen in plain view. The court recognized that in the military the business-supervisor and law-enforcement authority sometimes merge in the person of the commander. Also, government property within the command was subject to a thorough inspection at a moment's notice. The court held that Muniz had "only the most minimal expectation-or hope-of privacy in the drawer vis-a-vis his commander."[27]

The court also stated that the accused's commander had a compelling duty to notify his subordinate of his child's illness. A service member has a right to expect that, if his dependents are in trouble, his leaders will use every possible effort to locate him. Therefore, the court reasoned that the accused's commander was "virtually invited" to look in the credenza drawer when it became necessary to contact him because the accused was not where he was supposed to be.[28] The court found that the emergency, as reasonably perceived by the commander and the first sergeant, justified the entry. Thus, even if Muniz had a legitimate expectation of privacy in the drawer, the emergency exception to the fourth amendment applied to the search.

A soldier may still have a reasonable expectation of privacy in the contents of a desk or other government-supplied container; however, an inspection may be reasonable under the fourth amendment.

In summary, *Muniz* raises two issues worth special note. First, the court said that a soldier may have a fourth amendment privacy interest in government property other than that issued for personal use.[29] Second, the court suggested that a soldier's reasonable expectation of privacy with regard to certain property may be less vis-a-vis his superior or supervisor than it is vis-a-vis a law enforcement official. Defense counsel should be familiar with *Muniz* when confronting searches of government property in which counsel can articulate some legitimate fourth amendment privacy interest. Captain Kevin G. Sugg.

Watch That Waiver

In *United States v. Holt*,[30] the Army Court of Military Review held that matters elicited in the providency inquiry could be used in sentencing. *Holt*, however, is not settled law. The Court of Military Appeals recently granted review in the case.[31] In the meantime, it behooves trial defense counsel to remain alert to any far-ranging inquiries in providency by the military judge, lest waiver be found. A case in point, *United States v. Whitt*,[32] was recently decided by the Army Court of Military Review. In *Whitt*, a drug distribution case that might have potentially involved an entrapment defense, the military judge conducted an extensive inquiry into the accused's drug history. As the Army court acknowledged, the military judge continued his inquiry after he had already "more than adequately negated the possibility of the applicability of the [entrapment] defense."[33] Unfortunately, trial defense counsel agreed with the military judge when he opined that he could consider the accused's *prior* drug distribution, a fact elicited in providency, in assessing punishment.[34] The Army court expressed "reservations" about the admissibility of that portion of the accused's statement, but found waiver.[35]

Thus it is critical that defense counsel remain alert to this issue, object to an inquiry that goes beyond reasonable limits, and object to the use for punishment of matters elicited in providency.[36] While *Holt* remains pending on appeal, this may seem something like an exercise in futility but, if the issue is not preserved, the opportunity for relief is lost in the event *Holt* is reversed or your case is reviewed by a panel of the Army court that has, as did the *Whitt* court, "reservations." Captain Annamary Sullivan.

---

[26] *See* Mancusi v. DeForte, 392 U.S. 364, (1968); Katz v. United States, 389 U.S. 347, 352 (1967); Hoffa v. United States, 385 U.S. 293 (1966).

[27] *Muniz*, 23 M.J. at 206.

[28] *Id.*

[29] *Id.* at 205; *see* Mil. R. Evid. 314(d).

[30] 22 M.J. 553 (A.C.M.R. 1986).

[31] 23 M.J. 358 (C.M.A. 1987).

[32] CM 8600277 (A.C.M.R. 26 Feb. 1987).

[33] *Id.*, slip op. at 2.

[34] *Id.*

[35] *Id.* (citing Military Rule of Evidence 103(a)(1)).

[36] For practical advice on how to handle a *Holt*—type inquiry, see Note, *Too Much Providency?*, The Army Lawyer, July 1986, at 53.

Clerk of Court Note

Documents sent to the Clerk of Court after forwarding the record of trial to which they relate do not necessarily become part of the record for consideration by the Army Court of Military Review.

A common example is a letter from the accused to the convening authority seeking clemency. If the convening authority considered the letter before taking action on the sentence, we indeed can file the letter among the papers accompanying the record. If, however, the letter was not considered when the convening authority took action (for example, because it was received too late), the letter will be filed only with correspondence pertaining to the case and will not be reviewed unless it becomes part of the record on motion of a party. The point is, you must tell us whether the convening authority considered the letter. Two copies besides the original are required, and we need to know whether the letter was acknowledged (send copies of the reply), because we feel we must acknowledge the letter if you failed to do so.

Another example is the documentary exhibit, or a photograph being substituted for an item of real evidence, that was omitted from the record when mailed. Because these items perforce were not in the original record when it was authenticated by the military judge, they cannot be added to the trial record until they are authenticated. Therefore, if not attached to a certificate of correction authenticated as indicated in R.C.M. 1104(d), we will return them to you. Time and expense will be saved by having them authenticated before they are sent.

Items sent for inclusion in the record should be sent by certified mail, the same as the record of trial. They should not be sent in a carton with other records unless placed in a well-marked sealed envelope that cannot be mistaken for packing material.

Contract Appeals Division Trial Notes

Duplicate Submissions of Value Engineering Change Proposals

Major Craig S. Clarke
Contract Appeals Division

The government trial attorney in this case came as close to defending a contractor before the Armed Services Board of Contract Appeals (ASBCA) as is conceivable. How could this happen? This note discusses how it did happen in *Appeal of Industries,* ASBCA No. 30293 (3 Feb. 1987).

The United States Army Armament, Munitions and Chemical Command (AMCCOM), Rock Island, Illinois, purchases many types of munitions, including projectiles for the eight-inch howitzer. One type of eight-inch projectile is the Improved Conventional Munition (ICM), M509, round that caries M42 grenades. The M509 is a steel body projectile with an aluminum ogive (tip) and aluminum base. The aluminum base was pressfit onto the steel body and further secured by five shear pins. The ogive contained an explosive charge which, when ignited, would shear the pins and push the pressfit base away from the body, thereby expelling the M42 grenades out of the projectile and hopefully onto the target.

Mobilization planning dictates that a manufacturing base be maintained that is capable of meeting mobilization production rates for ammunition. Consequently, there are multiple facilities either manufacturing or capable of manufacturing most munitions. Two manufacturers were involved in producing the M509. NI Industries (NI) manufacturers it in its facility in Los Angeles, California, and Chamberlain Manufacturing Corp. operates the Army's Scranton Army Ammunition Plant in Scranton, Pennsylvania. In 1982 and 1983 both companies had contracts for the M509. Their contracts contained standard value engineering provisions.

Value engineering provisions encourage cost saving ideas by allowing a contractor to share in those savings. A contractor shares in savings on its own "instant" contract, on other contractor's ongoing, "concurrent" contracts, and on future contracts. It can also share in "collateral" savings arising from reductions in the cost of operation, maintenance, and logistic support functions. The high volume ammunition business presents a unique value engineering opportunity to manufacturers' because a small saving per round results in large savings on the contact. The claim in this case was for over seven million dollars.

Design responsibility for the M509 resided with the Armament Research and Development Command (ARRADCOM), Dover, New Jersey. ARRADCOM conducted a Product Improvement Program (PIP) investigation that considered replacement of the pressfit/pinned base with a threaded base. The threaded base design was approved and made a part of both contractor's contracts. The M509 threaded bases test fired during the PIP investigation had been machined out of eight-inch aluminum rod. Consequently, government drawings required that

production bases also be machined from eight-inch aluminum rod.

Machining is an expensive process. A less expensive process is to forge a part to the basic shape and then machine the details. The M509 base could be forged from a five-inch aluminum rod, resulting in less material scrap and less machining. Forging is basically moving metal to a desired shape by brute force applied by huge presses. All three parties in this case, the government. NI, and Chamberlain, were aware that forging was a possibility. Both contractors were considering submission of a Value Engineering Change Proposal (VECP) suggesting that the base be made from a forging.

In May 1983, NI employees discussed the use of forgings with the government and informed the government that they intended to submit a VECP. Chamberlain did not inform the government of its intent to submit a VECP, but was also working on one. Chamberlain submitted its VECP on 13 June 1983. Chamberlain's VECP was received and logged in at AMCCOM on 21 June 1983. Also on 21 June 1983, NI sent a TWX stating that its VECP had been submitted on that date. NI's VECP was received and logged in at AMCCOM on 27 June 1983.

AMCCOM Standard Operating Procedure 700–2 stated the command's policy concerning processing duplicate VECP's. When identical VECP's were submitted, the "first submitter" is entitled to all savings. Chamberlain's VECP was logged into the command log first and Chamberlain was therefore the "first submitter." Chamberlain's VECP was subsequently approved and NI's was disapproved. NI contended that its VECP should be considered first and claimed entitlement to $7,763,430.00 as its share of the savings. NI appealed the final decision denying its claim.

The trial attorney initially attempted to create third party practice before the board in order to bring Chamberlain within its jurisdiction. This was not successful. The government was therefore in the unique situation of having to defend Chamberlain in order to defend AMCCOM. The trial attorney worked closely with Chamberlain's in-house counsel, defended depositions of Chamberlain employees, and called Chamberlain employees as government witnesses. The government felt that Chamberlain's case for entitlement had to be presented in conjunction with the command's case to establish that there was no gross inequity or abuse of discretion.

The standard VECP clause creates a limitation on a contractor's appeal rights: "The Contracting Officer's decision to accept or reject all or part of any VECP, and the decision as to which of the sharing rates in (f)(1) below are applicable shall be final and not subject to the Disputes clause of otherwise subject to litigation under the Contract Disputes Act of 1978." The clause also contains guidance on the formalities of submission of a VECP.

NI and the government entered into extensive factual stipulations prior to the hearing. Post hearing briefs and reply briefs were filed, arguing a variety of issues involving contract law, administrative procedure, VECP policy, and equity.

On 3 February 1987, the board issued its decision denying the appeal. The board held that NI's oral discussions about its VECP were not VECP submissions pursuant to the clause. The board found that NI's VECP was specifically rejected, that there was no abuse of discretion, and pursuant to the VE clause, the rejection was final and not appealable. The limitation on appeal rights was enforced.

Subcontractors and the Equal Access to Justice Act

Captain Martin Healy
Contract Appeals Division

In *Teton Construction Co.*,[1] Teton sponsored[2] the appeal by allowing its subcontractor, Brower, to bring the appeal in Teton's name. Brower prevailed at the ASBCA and subsequently filed an application for attorney's fees under the Equal Access to Justice Act.[3] The prime contractor, Teton, did not meet the small business requirements of eligibility for recovery of attorney fees under the EAJA. The subcontractor Brower, however, did meet the small business requirements. Brower had prosecuted the appeal and incurred all fees and expenses. In its opinion on the appeal, the board had referred to Brower as the "real party in interest."

Pursuant to the government's motion, the board dismissed the EAJA application because Teton's net worth exceeded the EAJA corporate eligibility ceiling. The board reasoned that because the EAJA is a waiver of sovereign immunity it must be narrowly construed, and any award of attorney's fees must be authorized by express statutory language.[4] The board then noted that only contractors with

[1] ASBCA Nos. 27700 & 28968 (9 Jan. 1987).

[2] The practice of sponsorship evolved prior to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601–618 (1982) [herinafter CDA]. The contractor brings the appeal on the subcontractor's behalf or permits the subcontractor to bring the appeal in the name of the contractor. *See* Agnew Constr. Co., GSBCA No. 4178, 75–1 B.C.A. (CCH) ¶ 11,086 (1975). Congress contemplated that this sponsorship practice would be continued under the CDA. S. Rep. No. 118, 95th Cong., 2d Sess. (1978). Consequently, the Federal Acquisition Reg. (1 Apr. 1984) [hereinafter FAR] specifically allows prime contractors to sponsor appeals of subcontractors. FAR § 44.203(c) provides that "indirect appeal means assertion by the subcontractor of the prime contractor's right to appeal or the prosecution of an appeal by the prime contractor on the subcontractor's behalf."

[3] 5 U.S.C. § 504 (1982), 28 U.S.C. § 2412 (1982), *as amended by* Pub. L. No. 99–80, 99 Stat. 183 (1985) [hereinafter EAJA].

[4] Slip op. at 2 (citing Fidelity Constr. Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983); Unification Church v. I.N.S., 762 F.2d 1077, 1089 (D.C. Cir. 1985)).

privity of contract with the government have standing to sue it and that normally subcontractors do not have such privity and are not parties to a suit or appeal even though they may be the real party in interest.[5] The Board concluded that it would expand the waiver of sovereign immunity to allow EAJA recovery by subcontractors when they could not themselves appeal because they lacked privity with the government, and when the sponsoring prime contractor itself was not eligible.

Finally, the board noted that the subcontractor was not within the applicable definition of "party"[6] under the EAJA. It characterized as colloquial its prior reference to Brower as "the real party in interest," and held that Teton was the only party in the appeal.

The result in *Teton* is consistent with that in *T. H. Taylor, Inc.*, wherein the board held that

> when both a prime contractor and its subcontractor meet the qualifying size and net worth standards, the fees and expenses actually incurred by the subcontractor in bringing an appeal in the name of the prime are also incurred by the prime contractor as a "party" for purposes of an award [under the EAJA].[7]

When both the prime and the sponsored subcontractor meet the small business requirements, allowing recovery under the EAJA does not expand the number of potential qualifying litigants or, therefore, the waiver of sovereign immunity in the EAJA.

What is now left unresolved is whether a sponsored subcontractor can recover the EAJA even though it exceeds the small business requirements, if the prime sponsoring the appeal does meet those requirements. Under *Erickson Air Crane Co. v. United States*[8] and *Teton*, the prime contractor is the party whose attributes are determinative. A different result obtained in *Unification Church v. I.N.S.*,[9] however. There the court used the real-party-in-interest doctrine and determined that because only the Church, and not its members, would pay the attorney's fees absent an EAJA award, it was therefore the Church that was the "party."[10] Because the Church exceeded the small business limitations, the court denied recovery.

In *Unification Church*, however, the court was interpreting "party" as used in 28 U.S.C. § 2412. The definition paragraph for that term.[11] states only the size and net worth limits and does not require that the person have been "named or admitted," as do 5 U.S.C. §§ 504(d)(1)(B) and 551(3). That court noted that the language of 5 U.S.C. § 504(b)(1)(B) was both different than 28 U.S.C. § 2412(d)(2)(B), and clear.[12] Thus, analysis of that court's interpretation of "party" as defined differently than the term applicable in administrative agency proceedings is not binding.

Nevertheless, the legislative intent behind the EAJA, to allow small businesses and individuals to recover costs of successfully litigating unreasonable government action,[13] would probably support use of a real party in interest analysis to deny EAJA recovery where the sponsored subcontractor exceeds the corporate size limitations. Doing so would limit, not expand, the number of litigants potentially eligible for recovery, and would thus not breach the strict construction of the EAJA's waiver of sovereign immunity as Brower sought to do in *Teton*.

---

[5] Slip op. at 2–3 (quoting Erickson Air Crane Co. v. United States, 731 F.2d 810 (Fed. Cir. 1984)):

> Notice is hereby given that in future contract cases in this court, only the prime contractor may be the appellant. . . . A party in interest whose relationship to the case is that of the ordinary subcontractor may prosecute its claims only through, and with the consent and cooperation of, the prime, and in the prime's name.
>
> Prime contractors may turn over part of their . . . argument . . . to representatives of subcontractors, but this, when it occurs, is a private arrangement among interested parties which may not add to the jurisdiction of the court, or the burdens upon it.

[6] The EAJA is codified at 5 U.S.C. § 504 (1982) and 28 U.S.C. § 2412 (1982). The former provides for awards to prevailing parties in adversary adjudications of administrative agencies, and incorporates the definition of "party" from the Administration Procedure Act, which requires that a party "be named or admitted or properly seeking and entitled as of right to be named or admitted." 5 U.S.C. §§ 504(b)(1)(B), 551(3) (1982). The provisions of 28 U.S.C. § 2412 apply to proceedings in a court; its definition of "party" does not state such a requirement of having to be named or admitted. Although 5 U.S.C. § 551(3) has been interpreted as including any conceivable party who could be in litigation with the agency, Anchorage Building Trades Council v. Department of the Housing and Urban Development, 384 F. Supp. 1236, 1240 (D. Alaska 1974), a subcontractor without privity lacks standing to appeal and thus does not qualify.

[7] ASBCA No. 26494–O(R), 86–3 B.C.A. (CCH) ¶ 19,257.

[8] 731 F.2d 810 (Fed. Cir. 1984).

[9] 762 F.2d 1077 (D.C. Cir. 1985).

[10] *Id.* at 1082.

[11] 28 U.S.C. § 2412(d)(2)(B) (1982).

[12] 762 F.2d at 1088.

[13] S. Rep. No. 974, 96th Cong., 2d Sess. 10, 13–15, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4953, 4988–90, 4992–94; H. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 21, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5003, 5010.

This decade has seen great change in the technology and regulation of the telecommunications business. The march of technology and regulatory change promises future challenges for the communications officer and his or her lawyer. Pursuant to Army Regulation 27-40,[1] the Regulatory Law Office (JALS-RL) represents the consumer interest of the Army in this rapidly evolving environment. Understanding the basic scheme of economic regulation is important in grasping the gravamen of changes in public policy and technology.

With the passage of the Communications Act of 1934,[2] the regulation of interstate common carriers in the telecommunications industry devolved to the Federal Communications Commission (F.C.C.). The F.C.C. regulates interstate carriers providing telephone, telegraph, cellular radio, and long distance microwave communications services. State regulatory commissions hear matters involving intrastate telecommunications services. Unlike other regulated services, these services were priced by regulators and utilities, based upon value rather than cost of service. Such pricing was fostered by a goal of an all-encompassing national communications network, *i.e.*, universal service. This goal encouraged the engineering of highly compatible systems and encouraged vertical integration of corporate organization. Moreover, revenues derived in dense low cost markets where the value of service was high subsidized service to higher cost markets which placed no premium upon the value of service. This approach to regulation maximized the number of customers subscribing to telephone service, promoting "universal service."

Three recent changes augur for a closer nexus of pricing with the cost of service. Deregulation has played a role. Second, the corporate reorganization of a large segment of the industry. Last, changes in technology are making pricing cost sensitive.

The F.C.C. acted to deregulate the pricing of customer premises equipment in 1980.[3] In the years since this deregulation, the market for customer premises equipment has become highly competitive. The consumer no longer is required to use the equipment supplied by the utility. Consumers may acquire cheaper equipment or equipment tailored more precisely to their needs. This change has altered the stream of revenues recovered by telephone utilities.

Prior to this partial deregulation, extra revenues derived from the highly profitable rental of customer premises equipment helped to keep local exchange rates at lower levels. Now, the consumer has a wider range of choices of equipment of various manufacture and design at competitive prices. Local exchange carriers once had little competition in selling advertising in their "yellow pages." Extra revenues derived from this highly profitable business were applied by regulators as revenues of the local exchange. In a deregulated environment, competing firms are offering "yellow pages" advertising at competitive prices in some cities. Deregulation of "inside wiring" on the customers premises offers the potential for a wider range of firms to provide equipment, maintenance and repair services to the consumer.

Such competition will undoubtedly be reflected in prices, including competition for military business. Of special interest to the soldier are changes in the provision of coin-operated telephones on installations. In the past, the local exchange company had a monopoly on this service. In the future, this service will be coordinated primarily through the Army-Air Force Exchange System (AAFES). AAFES has pending requests for proposals related to this service. Competitive bidding will undoubtedly result in quality service to the soldier at fair prices. Deregulation of certain activities of telephone utilities as discussed above must be viewed separately from anti-trust actions or actions that increase competition between communications common carriers in the regulated market place.

A second change in the industry has been the break-up of the "Bell System" on January 1, 1984. This was a corporate reorganization arising from resolution of the anti-trust case.[4] American Telephone & Telegraph Company (AT&T) was permitted to remain an interstate common carrier and retain its research and manufacturing facilities. AT&T was ordered by Judge Harold H. Greene to spin-off its local exchange assets to seven regional firms. The divestiture of the local exchange companies did permit AT&T to enter the competitive computer business, which prior anti-trust orders had restricted. The seven regional firms, offering local exchange service, are permitted competitive activities that do not abuse the local exchange monopoly.

Court action has fostered "line of business" competition in the rendering of local exchange service and other activities among the seven regional companies divested by AT&T.[5] Competition in this market with independent telephone utilities has increased, too. The F.C.C. has fostered a competitive environment for AT&T and the other interstate carriers. Recently, the seven regional local exchange companies have sought permission to compete with their former parent (AT&T) and the other carriers in portions of the interstate market for long distance service. This action is still pending court approval.

Formerly, allocation of revenues derived from interstate toll service tended to keep rates for local exchange service (intrastate service) at lower levels. The consumer of interstate service subsidized the consumer using local exchange service. This was called the "Ozark Plan" of allocating revenues and costs between interstate and intrastate services.

---

[1] Dep't of Army, Reg. No. 27-40, Legal Services—Litigation, para. 1-4*g* (4 Dec. 1985).

[2] 47 U.S.C. §§ 151-610 (1982).

[3] *Re* Second Computer Inquiry, Docket No. 20828, 77 F.C.C. 2d 384, 35 Pub. Util. Rep. (PUR) 143, 250 (1980).

[4] United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *on reconsideration sub nom.* United States v. Western Elec. Co., 569 F. Supp. 1057 (D.D.C.), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

[5] *United States v. Western Elec. Co.*, 627 F. Supp. 1090 (D.D.C.), *rev'd in part*, 797 F. 2d 1082 (1986).

By 1981, approximately twenty-six percent of local exchange plant and equipment costs were being apportioned to the interstate service for recovery of revenues. The object of this course of action in regulated rate-making was to achieve "universal service" through cross-subsidization. A transition scheme using "access charges" has been adopted by the F.C.C.[6]

As suggested earlier, different rates are often assessed different consumers for essentially the same telephone service. A private residential line is assessed one rate, whereas similar telephone service to a merchant, hotel or military office is assessed a higher business, private-line rate. The high rates assessed for business private-lines have induced some larger consumers to invest in facilities to "bypass" the local exchange utility for a portion of their usage. Where new facilities have costs that are below the actual costs of service of the local exchange utility, such diversion of traffic is "economic bypass." Where "bypass" costs exceed the costs of the local exchange utility and are induced only by the rates, such diversion is "uneconomic bypass." Both bypass phenomena have appeared in the regulated market place. When some customers are driven to bypass the local exchange by rate imbalance, the remaining customers may have to absorb the loss of revenues in higher rates.

Cellular radio may become a technological alternative to local exchange service. Cellular radio is an integral part of modern mobile telephone technology. The courts have permitted competition among the seven regional companies of the former "Bell System" in cellular radio.[7] Independent firms are active competitors, too. While the existing local exchange (wire) carriers are getting into cellular radio, this technology may develop a competing local exchange network. There are many unanswered questions with these new technologies.

Pricing of the great bulk of telecommunications services occurs in rate cases before state and federal regulatory commissions. This pricing determination is called rate design. Failure to properly design rates in the new telecommunications environment may cause a utility to lose business for a portion of its services. Falling revenues would precipitate a further rate increase request and the downward financial spiral would continue. Few issues, perhaps none, have greater importance to the consumer than rate design.

The broad rate design area addresses the allocation of revenues between rate classes, *i.e.*, the different services offered by a utility. Rate design focuses on the specific revenue requirement of a specific rate class or tariff, and determines the manner in which the rate will be structured to produce the projected revenue level with some certainty. Consideration is given to the elasticity of demand for the service, competition, cross-overs between rates, new technologies, and other factors that may affect consumer decision-making. Some services may be priced on a flat monthly charge, while others may be more appropriately priced based upon usage.

Expert witnesses who present evidence on behalf of the telephone companies do not have the consumer interest of military installations as their primary concern. There are experts in telephone rate design, however, who can perform studies to be offered as evidence on behalf of large users of telecommunications services, such as military installations. The Regulatory Law Office has worked with Defense Communications Agency (DCA), the General Services Administration (GSA), other military departments, and involved Army commands in many cases involving telecommunications rate design. Witnesses have been provided by DCA and GSA and, at times, outside expert witnesses have been retained.

This effort can be substantially assisted by concerned installation personnel who identify the specific regulated telecommunications service or services that are primarily used by the installation, and the specific utility that provides the service. Often billings from the utility contain this information. After determining the types of services that are used by the installation, and some relative scale of the amount of billings for each service, an expert can conduct a study separating the relevant services and their costs from the overall utility cost of service. Separation and identification of these costs enables the expert to present a cost based rate design. The Regulatory Law Office has sponsored such expert rate design testimony most recently in New Jersey, Pennsylvania, California, Alaska and Hawaii.

Both procurement of telecommunications services and rate cases before regulatory commissions will continue to challenge the communications officer and his or her lawyers. Concerned personnel at installations are encouraged to report any rate filings made by local telephone utilities to the Regulatory Law Office in accord with AR 27–40.

---

[6] MTS & WATS Market Structure: Third Report and Order ¶ 368, 93 F.C.C. 2d 241 (1983), *aff'd*, National Ass'n of Regulatory Utility Comm'rs v. F.C.C. 737 F.2d 1095, 1147 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1985).

[7] United States v. Western Elec. Co., 578 F. Supp. 643 (D.D.C. 1983).

TJAGSA Practice Notes

Instructors The Judge Advocate General's School

Criminal Law Notes

The following three notes on pretrial restraint, speedy trial, and confessions are extracted from a revision of the Senior Officer Legal Orientation Deskbook now being published. The deskbook is used during a week long course at TJAGSA. The deskbook is also used for battalion and brigade commanders in the Pre-Command Course at Fort Leavenworth. These notes are republished here as they may be useful to judge advocates as an overview of these areas and in advising commanders.

Pretrial Restraint

1. In General. [Caution: Pretrial restraint is an actively developing area of the law. Also, some locations have other specific rules or procedures. Consult your local judge advocate]. A soldier in your unit has committed an offense under the Uniform Code of Military Justice (UCMJ). What do you do with him or her pending court-martial? The short answer is "[a]n accused pending charges should ordinarily continue the performance of normal duties within his or her organization while awaiting trial." Army Regulation (AR) 27–10, para. 5–13*a*. If specific circumstances require some pretrial restraint of the soldier, such as the need to ensure the soldier's presence at trial or to prevent criminal misconduct such as intimidation of witnesses, injuring others, or a threat to the safety of the community or to the effectiveness, morale, or discipline of the command, the soldier may be placed under pretrial restraint. UCMJ art. 10; Rule for Courts-Martial (R.C.M.) 305(h)(2)(B). As the soldier is presumed innocent until convicted, the restraint may not be punishment and must be the least restrictive restraint adequate to meet the circumstances that require the restraint. UCMJ art. 13; R.C.M. 305(h)(2)(B)(iv).

2. Types of Pretrial Restraint. The 1984 Manual for Courts-Martial specifies four types of pretrial restraint. From least severe to most severe they are:

a. *Conditions on liberty.* Conditions on liberty is named for the first time in the 1984 Manual and is defined as "orders directing a person to do or refrain from doing specified acts." R.C.M. 304(a)(1). Conditions on liberty would include orders to a soldier not to go to the location of an offense or not to approach a victim of an offense or witnesses. Conditions may be imposed separately or with other forms of restraint. R.C.M. 304(a)(1).

b. *Restriction.* Formally called "restriction in lieu of arrest," restriction is "the restraint of a person by oral or written orders directing the person to remain within specified limits." R.C.M. 304(a)(2). A soldier under restriction normally performs his or her usual duties. Common terms of restriction are, "to your place of duty, company (or battalion) area, dining facility, and chapel."

c. *Arrest.* "Arrest" is defined similarly to restriction as orders "directing the person to remain within specified limits." R.C.M. 304(a)(3). The limits of arrest are generally tighter than those of restriction and a person in arrest may not perform "full military duties," such as bearing arms or serving guard, but may "do ordinary cleaning of policing," or "routine training and duties." R.C.M. 304(a)(3). The distinction between "arrest" and "restriction" is largely a matter of degree and is important as arrest triggers more stringent speedy trial requirements. The facts of the restraint are conclusive, rather than the label used. The meaning of arrest in military practice as pretrial restraint should be distinguished from the common civilian meaning of being taken into custody. In military usage, "apprehension" is the equivalent of "arrest" in civilian terminology. R.C.M. 302(a)(1) and discussion.

d. *Confinement.* Pretrial confinement is the physical restraint of a soldier pending trial. R.C.M. 304(a)(4).

3. Administrative restraint. Administrative restraint should be distinguished from pretrial restraint. Limitations placed on a soldier for operational, medical, or other military purposes, independent of military justice, are not pretrial restraint. "Administrative restraint" placed on a soldier pending trial, however, will be scrutinized to see if it serves purposes wholly independent of military justice.

4. Authority to Order Pretrial Restraint. Generally, any commissioned officer may order the pretrial restraint of an enlisted soldier. A commanding officer may delegate authority to impose restraint on enlisted soldiers to *noncommissioned* officers. Authority may also be withheld by a superior commander. R.C.M. 304(b). Because imposing pretrial restraint is an important decision and can affect speedy trial requirements and result in credit against a subsequent court-martial sentence, the company level commander should normally impose any restraint that is required by the circumstances or advice the soldier pending trial that no restraint is imposed. Prior to imposing restraint, the commander should consult his or her supporting judge advocate.

5. Pretrial Confinement.

a. *In General.* As the most stringent pretrial restraint possible, specific procedures must be followed in putting a soldier in pretrial confinement. "In any case of pretrial confinement, the SJA concerned, or his or her designee, will be notified prior to the accused's entry into confinement or as soon as practicable afterwards." AR 27–10, para. 5–13*a*. Upon confinement, the soldier must be informed of the nature of the offenses for which held, the right to remain silent and that any statement may be used against him or her, the right to civilian counsel at no expense to the United States and to assignment of military counsel, and the procedures by which the confinement will be reviewed. R.C.M. 305(e). A soldier charged only with an offense normally tried by a summary court-martial will not ordinarily be put in pretrial confinement, UCMJ art. 10, nor will a person pending administrative discharge, when no charges are pending.

b. *The Test for Pretrial Confinement.* Pretrial confinement of a soldier is illegal unless:

> [T]he commander believes upon probable cause, that is, upon reasonable grounds, that:
>
> (i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at a trial, pretrial hearing, or investigation, or

(b) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

R.C.M. 305(h)(2)(B).

In Europe and some other places, the power of subordinate commanders to order pretrial confinement is withheld by the general court-martial convening authority and delegated to the staff-judge advocate (SJA).

" 'Serious criminal misconduct' includes intimidation of witnesses or other obstruction of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States." R.C.M. 305(h)(2)(B). The soldier who is an "irritant" and a "pain in the neck" in the unit may not be confined on that basis, but the soldier who is a "quitter," who disobeys orders and refuses to perform duties, or who is an "infection" in the unit and a serious threat to the effectiveness, morale, or discipline of the unit, may properly be confined. R.C.M. 305(h) analysis. Less severe forms of restraint must be considered, but need not be attempted and found inadequate.

c. *Commander's Memorandum.* When the commander (or the SJA, depending on local procedures) determines that the test for pretrial confinement is met, the commander must document the determination in a memorandum. R.C.M. 305(h)(2)(C). The "Checklist for Pretrial Confinement," DA Form 5112-R, satisfies the memorandum requirement. AR 27-10, para. 9-5*b*(2).

d. *Review of Pretrial Confinement by the Military Magistrate the "neutral and detached officer" of R.C.M. 305(i)(2)).* Within seven days after pretrial confinement, the confinement will be reviewed by a military magistrate who will approve continued confinement or order the release of the soldier. R.C.M. 305(i). If a soldier is ordered released from confinement, he or she may not be confined again before completion of trial except upon discovery of new evidence or misconduct that justifies confinement either alone or together with all other available information. R.C.M. 305(l).

6. Sentence Credit for Pretrial Restraint: When the commander considers whether pretrial restraint is appropriate, he or she should also consider that upon conviction and sentence, a soldier will receive *day for day credit* on the sentence *for pretrial confinement and for restriction or arrest which is "tantamount" to confinement.* Restriction or arrest is "tantamount" or equivalent to confinement when the limits and conditions of restriction, taken together, show circumstances amounting to physical restraint. When a soldier is restricted to a relatively small area (such as to a floor of a barracks), has sign in requirement each hour or less, is escorted from place to place, and does not perform normal duties, the restriction would likely be found tantamount to confinement.

In addition to the day for day sentence credit a soldier will receive for all pretrial confinement and restriction tantamount to confinement, a soldier will receive *additional credit* for *pretrial restraint which violates R.C.M. 305 or Article 13, UCMJ.* R.C.M. 305 is violated if pretrial confinement or restriction tantamount to confinement is served as a result of an *abuse of discretion or* in *violation* of the *procedural requirements* of R.C.M. 305, including providing military counsel to a confinee upon request and the commander properly applying the standard for restraint and documenting the decision in a memorandum. R.C.M. 305(j)(2) and (k). Commanders should be aware that if they impose restriction tantamount to confinement, the procedural rules for confinement will be applied and the soldier will receive day for day credit for the restriction tantamount to confinement, *plus* an additional day for day credit for any failure to follow the procedural rules for confinement.

A soldier will *also receive credit* for pretrial restraint that violates the prohibition of Article 13, UCMJ, against *punishment prior to trial.* When the conditions of pretrial restraint do not serve a legitimate, nonpunitive purpose, the restraint will be found to be punishment. Specifically prohibited are punitive labor, duty hours, training, or wear of a special uniform. R.C.M. 304(f).

7. Conclusion. A soldier pending charges should ordinarily continue the performance of normal duties in the unit while awaiting trial. If specific circumstances require some pretrial restraint of the soldier, the commander has ample tools available to meet the circumstances. If a soldier is put in pretrial confinement or under restriction tantamount to confinement, he or she will receive day for day credit off the sentence. If restraint is imposed as an abuse of discretion, in violation of certain procedural rules, or as punishment, the soldier will receive additional credit off his or her sentence. Major Wittmayer.

Speedy Trial

1. In General. After an offense occurs, effective law enforcement and discipline require that a timely inquiry be made into the incident by the company level commander while the facts are fresh, and any appropriate charges be brought and expeditiously resolved by trial. Delay in investigation and disposition of offenses undercuts morale and discipline. Also, an accused soldier has a right to a speedy trial. *If the government violates an accused's right to a speedy trial, the charges will be dismissed.*

2. Speedy Trial Rules. There are several rules that define an accused's right to a speedy trial. Under R.C.M. 707, all accused soldiers must be brought to trial within 120 days after the earlier of imposition of restraint or notice of preferral of charges. Under limited circumstances, some periods of time may be excluded from this 120 day period, giving the government additional time. A more stringent rule applies if an accused is in pretrial confinement, arrest, or restriction tantamount to confinement: the accused must be tried within ninety days. Also, if an accused requests a speedy trial, the government is on notice that its further processing of the case will be scrutinized by the court to determine whether the government proceeded with reasonable diligence. Under this "demand rule," even ninety days to trial may be too long.

3. Avoiding Speedy Trial Problems. As a general rule, the commander should seek to have cases resolved within ninety days of the day of an incident, and even more quickly if circumstances permit, particularly if an accused has requested a speedy trial. Immediately upon learning of an incident, the company level commander should begin the preliminary inquiry called for by R.C.M. 303. As appropriate, law enforcement assistance should be requested. Early coordination should be made with the unit's supporting judge advocate. Any witnesses needed for trial must be identified and put on hold. Case files should be handcarried. Necessary charges should be brought without waiting for final military police or Criminal Investigation Division (CID) reports. Timely action from incident to final disposition will best serve law enforcement and discipline, and the right to a speedy trial. Major Wittmayer.

Confessions, Self-Incrimination, and Immunity

1. Introduction. During the company level commander's preliminary inquiry into an incident (R.C.M. 303), the commander, or the military police or CID, will naturally want to talk to the people involved in the incident. The commander needs to get the facts and also would like to get an admission from the soldier suspected of an offense. An admission or confession will be useful evidence at trial, but the investigation must go beyond the confession because a confession is inadmissible at trial unless there is independent evidence that *corroborates* the essential facts of the confession. Mil. R. Evid. 304(g).

While the commander or the police would like to gain an admission from a suspect, soldiers have a *right against self-incrimination* and a *right to counsel,* as do all citizens. These rights are implemented by a *rights warning.* Before a *suspect* is *questioned,* he or she must be *advised* of these *rights.* The suspect may *waive* the rights and choose to make a statement or may *invoke* his or her rights. If a soldier *invokes* his or her rights, the questioning must immediately *stop.* At that point, if the commander has not previously consulted his or her supporting judge advocate, the commander should do so now to determine how best to proceed further.

2. Sources of the Rights. A soldier's right against self-incrimination and right to counsel are derived from three sources, Article 31 of the UCMJ, and the fifth and sixth amendments to the United States Constitution. These sources of the rights state in pertinent part:

The Fifth Amendment. "No person . . . shall be *compelled* in any *criminal* case to be a *witness against himself.* . . . "

Article 31(a), UCMJ. "No person subject to this chapter may *compel* any person to *incriminate himself* or to answer any question the answer to which may tend to incriminate him."

Article 31(b), UCMJ. "No person subject to this chapter may *interrogate,* or *request any statement* . . . without first *informing* him of the nature of the accusation and advising him that he does not have to make any statement . . . and that any statement made by him may be used as evidence against him in a trial by court-martial."

The Sixth Amendment. "In all criminal prosecutions, the accused shall . . . have the *Assistance of Counsel* for his defence."

3. The Right Against Self-Incrimination. While soldiers have a right against self-incrimination, that right does not protect a soldier from all evidence that might be gained from him or her. The right against self-incrimination only protects the soldier from being compelled to give evidence of a "testimonial or communicative nature." Mil. R. Evid. 301(a). What is protected is what is in the soldier's mind, what he or she knows. Thus, a soldier cannot be compelled to give an oral or written statement. A soldier also may not be compelled to do a physical act which is the equivalent of speaking. Examples of physical acts which are the equivalent of speaking would be the soldier's response to telling him to produce an item he or she is suspected of stealing or to produce items, such as drugs, which are illegal to possess. The physical act of producing the item is the equivalent of the soldier saying, "Here is the illegal thing I possessed." Examples of things that are not protected are physical characteristics such as: body fluids (blood, urine); fingerprints; footprints; exhibiting scars or other physical characteristics; trying on clothing; and voice and handwriting samples. A person's identification also is not protected. If a commander observes some misconduct, he or she can order a soldier to identify himself or herself both verbally and by producing identification.

4. Rights Warnings. When a suspect is questioned, he or she must be advised of his or her rights. Usually this is done by the commander or police reading the rights from a rights warning card or from a DA Form 3881, "Rights Warning Procedure/Waiver Certificate." It is better to use DA Form 3881 because the form later can be used at trial as documentary evidence of the warning and waiver, if the rights are waived.

In military practice, we usually do not distinguish among the specific sources and content of the rights warnings. The rights warning card and DA Form 3881 include all the necessary rights warnings. Commanders should be generally aware, however, that three rights warnings are given, derived from the three sources of the rights discussed above. Taken together, these three rights warnings include the required four points of the rights warnings. A suspect is warned of: the "nature of the accusation"; that he or she "does not have to make any statement"; that any statement may be "used as evidence against" you; and the "right to an attorney."

A chart of the three sources of the rights and their required warning appears below.

Rights Warnings

Art 31(b) (pressures of rank)	*Miranda* (5th Amendment)	Mil. R. Evid. 305(d)(1)(B) (6th Amendment)
Trigger:		
questioning	questioning	questioning
(words or actions; not if spontaneous or volunteered)	(words or actions; not if spontaneous or volunteered)	(words or actions; not if spontaneous or volunteered)
+ accused (after preferral) or *suspect* (objective test)	+ custody	+ after preferral or pretrial restraint
Content:		
1. "nature of the accusation"	—	—
2. "not have to make any statement"	"right to remain silent"	—

3. "used as evidence against him"	"used as evidence against him"	—
4. —	"right to . . . an attorney"	right to counsel

Note that not only is the content of each warning different (while overlapping), but also that the legal requirement to give the warning is triggered by different events. All three are triggered by "questioning," but the second element of the trigger differs: Article 31(b), UCMJ warnings are required when there is questioning of a suspect; *Miranda* warnings (derived from the fifth amendment) are triggered by questioning of a person in custody; and the warning required by Military Rule of Evidence 305 (derived from the sixth amendment) is triggered by questioning of a soldier after preferral of charges or imposition of pretrial restraint.

When a commander or the police want to question a soldier who they reasonable should believe may have committed an offense (that is, applying an objective test, the soldier is a suspect), the requirement to give Article 31(b) warnings is triggered. When the first trigger occurs, we generally do not distinguish among the rights warnings and all the rights warnings which are combined on the rights warning card of DA Form 3881 are given.

"Questioning" or "interrogation" occurs whenever the commander or the police engage in any "words or actions reasonably likely to elicit an incriminating response." Questioning, thus clearly includes more than a general understanding of the word. An example of the broader meaning of "questioning" would be when a commander inspects the company to find a stolen weapon, discovers it hidden in a common area, and calls the soldier suspected of taking the weapon into the commander's office and attempts to prompt a response by showing the soldier that the weapon has been found.

It is *not* "questioning" when a soldier volunteers information or spontaneously gives information without any "words or actions reasonably likely to elicit an incriminating response" from the commander. If the commander simply listens to the soldier, and no questioning occurs, there is no requirement to stop and advise the soldier of his rights. If the commander wants to question the soldier after the volunteered information, then rights warnings must be given.

The bottom line on rights warnings is this: if the commander, or any person acting in an official law enforcement or disciplinary capacity questions a suspect, the rights warnings must be given.

5. Waiver of Rights. After a suspect is advised of his or her rights, he or she may waive them or invoke them. If a soldier waives his or her rights and gives a statement, in order for the trial counsel to use the statement at trial, if an issue is raised by the defense, the trial counsel must prove by a preponderance of the evidence that the suspect was properly advised of the rights and voluntarily waived them. To carry this burden, the prosecutor will call to testify the person who gave the warnings and heard the suspect's waiver. If there is a dispute on the facts, it helps the government if there is a witness to the warnings and waiver who may also testify. The best way for the trial counsel to show a voluntary waiver of rights is if the person who gave the warnings can testify that the following three questions were asked of the suspect and clear responses were received:

(1) Do you understand your rights? Yes.

(2) Do you want a lawyer? No.

(3) Are you willing to make a statement? Yes.

Thus, after the commander or police advise a soldier of his or her rights, they should ensure that if the soldier chooses to waive these rights, he or she does so clearly. The trial counsel can then make the necessary proof at trial. The rights warning card and DA Form 3881 include the substance of these three questions.

6. The "Notice to Counsel," *McOmber* Rule. In *United States v. McOmber*, 1 M.J. 380 (C.M.A. 1976), codified in Military Rule of Evidence 305(e), a "notice to counsel" rule was adopted for the military. Under this rule, when a commander or other person intends to question a person suspected of an offense and knows or reasonably should know the suspect already has counsel with respect to the offense, the questioner must give notice to the counsel of the intended questioning and a reasonable opportunity for the counsel to be present. Under Military Rule of Evidence 305(g)(2), a waiver of rights by a suspect will not be effective unless reasonable efforts to notify the counsel were unavailing or the counsel did not attend within a reasonable period of time. The best way to proceed when the notice to counsel rule applies is for the questioner to seek the advice of the supporting judge advocate.

7. Due Process Voluntariness. The base protection a soldier has from being compelled to give a statement against himself is the "due process voluntariness" doctrine. This doctrine is incorporated in Article 31(d) of the UCMJ, which states that any statement obtained through the use of "coercion, unlawful influence, or unlawful inducement" may not be used against a soldier in a court-martial. While the voluntariness doctrine provides protection beyond the rights warning and waiver requirements, a correct rights warning and waiver will tend to show there was also no violation of the voluntariness doctrine.

8. The Remedy of Exclusion. If a questioner *violates* the requirements for warnings, waiver, notice to counsel, or the voluntariness doctrine, any statement obtained from a suspect which might have been used against the suspect at trial is excluded from evidence. Also, any evidence derived from the statement must be excluded. This may not, however, be the end of the Government's case. If the trial counsel can prove the case with evidence that is independent of the inadmissible statement, the prosecution may go forward. The prosecutor may also use evidence obtained or derived from an inadmissible statement if it can be shown the evidence would have been discovered even if the inadmissible statement had not been made. An example of this "inevitable discovery" doctrine would be when a weapon used in an assault is found based on an inadmissible statement of a suspect, but the government can show a lawful search or inspection was underway that would have discovered the weapon even without the inadmissible statement. The best approach, however, is not to violate any of the various requirements and to avoid the exclusion of a useful statement.

9. Immunity. Commanders should be aware that a general court-martial convening authority has the power to grant testimonial immunity to a witness and to order the witness to testify in a case. Immunity overcomes the right against self-incrimination. Immunity might be used in a case in which other proof is lacking beyond the testimony that might be given by one of several soldiers involved in an offense. In these circumstances, testimonial immunity might be granted to one soldier to gain his or her testimony

against the other soldiers. When another soldier is convicted, this soldier may be granted testimonial immunity and his or her testimony may then be used against the first soldier. Major Wittmayer.

The Supreme Court Hears *United States v. Solorio*

On 24 February 1987, the military justice system took another step forward, as the case of *United States v. Solorio*[1] was heard in oral argument by the Supreme Court of the United States.

Solorio is the first military case to reach argument before the Supreme Court pursuant to the Military Justice Act of 1983, and only the second to be granted certiorari pursuant to this legislation. Solorio's importance, however, is not limited to its symbolic significance. *Solorio* presents the Supreme Court with the opportunity to define or redefine subject-matter jurisdiction, a determination that by its very nature shapes every aspect of military criminal practice.

The government was represented in oral argument by the Solicitor General's Office while Yeoman First Class Richard Solorio was represented by his Coast Guard appellate counsel, Lieutenant Commander (LCDR) Robert Bruce with assistance from a civilian counsel, Mr. Eugene Fidell. All nine members of the Court were present for oral argument with Chief Justice Rehnquist presiding. The defense team argued first. LCDR Bruce told the Court that service-connection was not established in this case and that the wrong test was used by the Court of Military Appeals in determining service-connection. The Court, however, did not seem interested in the analysis of the Court of Military Appeals, but rather, their own analysis in *O'Callahan v. Parker.*[2] Chief Justice Rehnquist led off a series of questions with "Wasn't *O'Callahan v. Parker* a departure from over a century of precedent?" This line of questioning was later continued by Justice Scalia, who asked "Should we reconsider our decisions in *O'Callahan v. Parker* and *Relford v. Commandant?*"[3] Mr. Fidell answered for the defense team in the negative. The Chief Justice noted, however, that one reason to overturn these decisions was that they were wrong as a matter of constitutional law.

The government's argument was shorter and comparatively uninterrupted by questions. The government argued that: *O'Callahan v. Parker* is obsolete; the concerns about military justice addressed by Justice Douglas in *O'Callahan v. Parker* had been corrected; and further problems in the military justice system could be resolved on due process considerations rather than making them jurisdictional issues. Neither Justice Brennan nor Justice Marshall, both members of the majority in *O'Callahan*, asked any questions.

Who won the argument? The Court. I would note, however, that many military practitioners present in the audience were surprised by the support displayed by many members of the Court for a return to status as the sole determinant of jurisdiction. The birth of military Supreme Court practice may have marked the end of *O'Callahan v. Parker.* Major Williams.

[1] 21 M.J. 251 (C.M.A.), *cert. granted,* 106 S. Ct. 2914 (1986).

[2] 395 U.S. 258 (1969).

[3] 401 U.S. 355 (1971).

International Law Note

Use of the .50-Caliber Machinegun

One of the recurring myths surrounding the law of war involves a supposed prohibition against the use of the .50-caliber machinegun against enemy personnel. The following opinion, DAJA-IA 1986/8044, 21 Nov. 1986, issued by the International Law Division, Office of The Judge Advocate General, dispels this myth, definitively demonstrating that use of the weapon against personnel in the field is consistent with both customary and codified international law:

There is a long history of employment of infantry weapons up to .70 caliber against enemy personnel. The first U.S. musket, made in 1795, was .70 caliber. The first U.S. percussion musket, the Model 1842, was caliber .69, as was an 1847 musketoon developed for use by cavalry, artillery, and sappers. In 1855 the U.S. Army standardized the caliber .58; the Navy chose to retain the larger caliber .69. Larger wall pieces—up to caliber .75—were manufactured as long range sniper rifles for defense of frontier posts. Muskets and rifles used by other nations during this time also ranged up to .70 caliber.

With the introduction of better grade steel, the breech lock system, rifling, and more powerful propellants, calibers decreased. By 1900, projectiles ranging from calibers .236 to .315 had been adopted by the major nations of the world. In contrast with the issue at hand, some argued that this decrease in caliber (and a commensurate increase in muzzle velocity) caused greater suffering than previous larger-caliber weapons, an argument similar to that proffered by Sweden in the 1970s against the 5.56mm (.223 caliber) M-16 rifle. This argument was not supported by medical evidence on either occasion, and was rejected at the Hague Peace Conferences of 1899 and 1907 and the 1978–1980 United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects [hereinafter UNCCW].

Larger-caliber weapons have remained in the inventories of virtually every nation. For example, the Soviet Union mounts the NSV .50 caliber machinegun on its tanks; it can be removed and employed on a tripod in a ground mode. Nations generally employ .50-caliber machineguns as antiaircraft, antimateriel, and antipersonnel weapons. On occasion, they have been employed specifically as long-range sniper weapons. The Soviet PTRD was a 14.5mm (.58 caliber) bolt-action, single-shot antitank weapon employed during World War II; because of its long-range accuracy, it was frequently employed as a sniper weapon against German troops. Similarly, the Browning Machinegun Caliber .50 HB, M2 currently in use by U.S. forces, was employed as a single-shot sniper rifle during the Vietnam War.

Doctrine for the Browning Machinegun Caliber .50 HB, M2, is contained in U.S. Army Field Manual 23-65 (May 1972). Paragraph 80 provides in part:

Types of targets. Targets presented to the machinegunners during combat will in most cases consist of enemy soldiers in various formations which require distribution and concentration of fire. . . .

a. Point targets are targets which require the use of a single aiming point. Enemy bunkers, weapons emplacements, vehicles, small groups of soldiers, and aerial targets such as helicopters or descending paratroopers are examples of point targets. . . .

During the 1978 to 1980 UNCCW, as well as at separate conferences of government experts held at Lucerne and Lugano in 1974 and 1976, respectively, discussions of small-caliber weapons included all weapons up to .50 caliber. There were no proposals to restrict the use of the larger small-caliber weapons against personnel. In addition to their universal employment as antipersonnel weapons, there was the practical realization that in firing .50 caliber projectiles at other legitimate targets (for example, enemy vehicles), some rounds inevitably would strike exposed enemy personnel. Hence it would have been impossible to attempt to limit the intentional attack of enemy personnel with .50 caliber weapons when those personnel could be struck by the same projectiles as the result of the lawful attack of materiel targets.

Employment of the .50 caliber machinegun or other .50 caliber weapons against enemy personnel does not violate the law of war. There remains the question of how the misperception arose as to its purported illegality. There appears one plausible explanation.

During the 1950s, 1960s, and 1970s, the U.S. Army and Marine Corps had in their inventories the M40 106mm recoilless rifle. Designed primarily for antiarmor use, the M40 was equipped with the M8C .50 caliber spotting gun. The M8C was used to assist the gunner in determining range and leads to the target. It fired a spotter-tracer round containing a tracer element and an incendiary filler. On impact, the incendiary filler produced a puff of white smoke intended to aid in adjusting fire. The spotter-tracer round was designed so that its trajectory matched the trajectory of the 106mm recoilless rifle service ammunition. The spotter-tracer round was designed to be used in the spotting gun only.

Although the M40 could be utilized against enemy personnel (using the flechette-loaded M581 APERS–T round), the M40 essentially was a single shot antitank weapon that relied on concealment and surprise in order to attack enemy armor and survive on the battlefield. Utilization of the M8C .50 caliber spotting gun against an individual soldier would have compromised the position of the M40, making it and its crew vulnerable to attack. Hence tactical, not legal, limitations were placed on the employment of the M8C .50 caliber spotting gun against enemy personnel. It appears that this practical limitation on the use of the M8C somehow was transferred to all .50 caliber weapons, and that in time it was assumed that the restriction was based on some aspect of the law of war. Such transfer of this tactical limitation and the assumption of a law of war basis are incorrect.

Current Army doctrine providing for the use of the .50 caliber machinegun as an antipersonnel weapon is consistent with the law of war obligations of the United States. No treaty language exists (either generally or specifically) to support a limitation on its use against personnel, and its widespread, long-standing use in this role suggests that such antipersonnel employment is the customary practice of nations.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, Army, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

Award for Excellence in Legal Assistance

The results of the competition for the best large and best small legal assistance office have recently been announced. Sixteen offices submitted nominations for the large office award: Fort Benning, Fort Carson, Fort Knox, Fort Leonard Wood, Military District of Washington, Fort Ord, Fort Riley, Fort Rucker, Fort Stewart, 3d Armored Division, 3d Infantry Division, 8th Infantry Division, III Corps, 82d Airborne Division, XVIII Airborne Corps, and 21st Support Command. The following is the text of a message from Major General Overholt to the Commander, XVIIIth Airborne Corps, announcing the results of the large office competition:

1. Congratulations! XVIII Airborne Corps has been selected as the winner of the 1986 competition for The Judge Advocate General's Award for Legal Assistance in the large office category.

2. Nominees for this award represented the best in legal assistance services throughout the world. Your legal assistance and preventive law programs were particularly noteworthy for establishing an in-court representation program, streamlining the operation of the Armed Forces Disciplinary Control Board to assist soldiers and their families by more efficiently curbing questionable business practices, and establishing an effective legal assistance council with the other legal assistance offices in your area.

3. I appreciate your emphasis on positive and innovative legal programs to help our soldiers. Please convey my congratulations and appreciation to Jim Gleason, your legal assistance attorneys, and their staff.

4. A presentation of the award will be made in the near future.

Six offices submitted nominations for the best legal assistance office in the small office category: Berlin, Fort Detrick, Japan, Fort Leavenworth, Fort Ritchie, and SETAF. The winner of the small office competition was SETAF. In a similar message sent to the Commander, SETAF, MG Overholt congratulated SETAF on its preventive law programs and particularly its aggressive tax assistance program, an outstanding legal assistance handbook for new arrivals, and its roundtable exchange of judge advocates and local national attorneys from Italy, Turkey, and Greece.

Consumer Law Notes

Consumer Scams

Legal assistance officers are frequently the first officials to become aware of consumer scams. Often, the perpetrators of these schemes target military communities. While the offenders may be caught and their activities curtailed at one location, these individuals often then move their operations to locations that are adjacent to other military installations.

This result could be avoided through an aggressive preventive or proactive law program at the Army level. Legal assistance officers who encounter new schemes that prey on soldiers are encouraged to communicate this information to the Legal Assistance Branch so that it can be disseminated throughout the Army. The Branch will make every effort to publicize the information both to other judge advocates and to the Army community. Information should be directed to The Judge Advocate General's School, ATTN: ADA–LA, Charlottesville, Virginia 22903–1781, or by telephone to 1–800–654–5914, extension 369 or commercial (804) 972–6369.

Job Promises May Deceive

The Alabama attorney general has obtained a preliminary injunction against Advanced Personnel, Inc., for violations of the Alabama Deceptive Trade Practices Act. Advanced Personnel, owned by Jim Lewis (also known as Jim Johnson), allegedly deceived customers with unfulfilled promises of jobs by offering them "job placement" contracts for an initial fee of $90 plus $50 upon job placement, or $140 for a "lifetime" membership. The state alleges that Advanced Personnel took the money up front, guaranteed the clients jobs, and then failed to produce the jobs. Lewis, who was previously enjoined in Alabama from operating a business called Job Information Directory, is currently also operating similar enterprises (including a business called Futures Employment Service) in Florida and Georgia.

Herbalife—The Saga Continues

A consumer protection action against Herbalife International has resulted in a settlement that includes payment to plaintiffs of $850,000, revision of the 1986 Official Career Book, and an agreement that Herbalife will not continue to represent that their products: naturally eliminate "cellulite"; combat premature aging; naturally curb the appetite or burn off calories; and will cause the consumer to lose weight without a reduction in caloric intake. The settlement also requires that Herbalife affirmatively disclose the existence of caffeine in many of its products and that the company refrain from using testimonials that attribute curative or preventive properties to its products unless the claims are true and are permitted by law.

"Radionics"

A consumer protection lawsuit has been filed in Iowa against defendants located in Georgia, Minnesota, Michigan, Arkansas, Ohio, and Illinois in connection with the sale of a "radionics device," which allegedly is merely "a box with blinking lights." Consumers have been charged from $750 to over $3,000 for the device (and as much as $3,500 for instruction in the proper use of the device), which defendants claim is able to examine the chemical and physiological structure of animals, plants, soil, and water by measuring the energy of a polaroid photograph of the object. The device is also advertised to "potentize" and object by transferring "soft electrons" from one object to another, permitting the second object to take on the same energy level as the first. The Iowa attorney general's office has determined that these abilities, which allegedly have benefits in preparing medicines and fertilizers, have no scientific basis.

"Activator" Pyramid Schemes

Two pleas of guilty and several additional indictments appear to be unravelling a pyramid scheme pursuant to which thousands of investors were sold in excess of $80 million worth of "activator" kits containing white powder and advertised to assist in growing cultures that could be sold at great profit to investors. For example, defendants represented that for an initial purchase of ten activators at a cost of $350, an investor could expect a potential income of $900 after a fifteen week growing period because demand for the cultures was extremely high. In fact, the only demand for the cultures was by companies created by defendants to make it falsely appear that there was a substantial market for the cultures being grown.

Coupon Pyramid Schemes

Empires Unlimited and International Smart Shoppers have recently run illegal pyramid schemes that promise commissions and bonus payments and then close the operation rather than make the promised payments. International Smart Shoppers, which was the subject of litigation by Texas, Oklahoma, and Arkansas, apparently recruited more than 80,000 people before going out of business, when it owed unpaid commissions and bonuses to thousands of distributors.

The most recent incarnation of the coupon pyramid scheme, Independent Shoppers of America (ISA), promised to pay these bonuses if the members of International Smart Shoppers paid to join ISA. ISA recruits subscribers and distributors for an initial payment of $45, monthly payments of $30, and an entitlement to receive $90 worth of coupons that may subsequently be sold. In addition, members are told they can receive bonuses based on orders placed for the coupons by their recruits and by those recruited by their recruits. In reality, however, there appears to be no market for the coupons; the sale of coupons is merely a subterfuge for the sale of positions in an endless chain.

Income Withholding Statutes

The federal Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749 (1982)) was enacted to "put some teeth" into federal debt collection efforts. That statute amended 31 U.S.C. § 3716 (regarding administrative offsets), 5 U.S.C. § 5514 (regarding salary offsets), and 31 U.S.C. § 3720A (regarding tax refund interception), permitting federal agencies to withhold federal salary payments and other federal benefits from those who owed money to the federal government as a result, for example, of reports of survey, unrepaid federally insured student loans, and sums advanced but not used for allowable travel expenses. Each of these provisions contains procedural protections prior to initiation of the collection, including notice and an opportunity to submit information either personally or in writing before the collection action begins.

Following this lead, Illinois enacted a state employees' wage withholding statute that authorized the state to withhold a state employee's wages if the employee were indebted to the state. In the recent case of *Toney v. Burris*, No. 86 CC 3333 (N.D. Ill. Oct. 31, 1986), however, the court ruled that the state statute and its implementing regulations were unconstitutional because they provided for no predeprivation notice or opportunity to be heard. Although the employee was afforded the opportunity to protest the withholding in writing within thirty days after its initiation, the court found that the due process protections were insufficient absent an opportunity to challenge the existence, accuracy, or current collectability of the claimed deficiency or the ability to obtain further information regarding the debt before collection was initiated. The court additionally found insufficient due process protections in this case because the employee had no opportunity to appear personally, there was no requirement that a written record of the protest be maintained, and there was no opportunity for judicial review.

Legal assistance attorneys are reminded to review collection procedures to ensure that clients are afforded sufficient notice, opportunity to respond, and review of adverse decisions. Absent such due process protections, the statute itself, the implementing regulations, or the procedures applied in a given case may be open to state or federal constitutional challenge.

Pawnbrokers' Leaseback Schemes May be Suspect

A Georgia pawnbroker has agreed to settle a suit in which the plaintiff alleged that the pawnbroker's scheme violated both state and federal law. The plaintiff pawned her automobile with the defendant's pawn shop for a six-week loan of $300. Because Georgia law limits pawn loans to a maximum interest rate of two percent per month, defendant induced plaintiff to sign what purported to be a lease of her own automobile for the same six-week period. The total payments under the lease would have yielded an undisclosed annual interest rate of 827%. After her car was repossessed, plaintiff sued defendant for conversion and violation of the state pawnbroker and federal Truth in Lending acts. Prior to trial, defendant agreed to pay plaintiff $5,000 and to cease and desist from using the leaseback scheme.

J.C. Penney Agrees to Cease Filing Collection Actions in Distant Forums

Pursuant to a complaint challenging the J. C. Penney Company's forum selection as an unfair trade practice in Virginia (a state that has liberal venue provisions), Penney's and the Federal Trade Commission entered a consent agreement applicable nationwide (51 Fed. Reg. 43,932 (1986)). The consent agreement provides that Penney's, which is the nation's third largest retailer, will either transfer all collection actions to a court in the county in which the consumer resides or in which the consumer signed the sales contract, or dismiss the collection action if it has been brought in a "distant" forum and the action is not transferred. Credit reporting agencies must be notified of all dismissed cases.

Consumers required to respond to collection actions brought in inconvenient or distant forums should review state unfair and deceptive acts and practices laws, which frequently forbid this practice with respect to collection actions even if it is otherwise permitted under state law. State law may also prohibit consumer waiver of the right to a convenient forum.

Unlicensed Sellers May Be Violating State Statutes Prohibiting Unfair and Deceptive Trade Practices

Those who advertise or sell without the necessary state license to do so may be violating state statutes that prohibit unfair or deceptive trade practices ("UDAP" statutes). For example, in Maryland, which requires that those who lease multiple-family dwellings first obtain a license or temporary certificate to do so, the court in *Golt v. Phillips*, 308 Md. 1, 517 A.2d 328 (1986), found that the rental of such property without such a license constituted a deceptive trade practice. The Court reached this result notwithstanding the absence of an affirmative claim by the landlord that the apartment was licensed, the landlord's lack of knowledge that the apartment was unlicensed, and the tenant's inspection of the premises prior to entering the lease agreement. Finding that the scienter is not an element necessary to a Maryland state UDAP claim, the court opined that a landlord should not be permitted to retain any benefit from an unlicensed and illegal lease.

This case, in which the court held that the tenant was entitled to restitution of all rent paid and to consequential damages (including the cost of moving to substitute housing and the difference between the remaining rent under the unlawful lease and the cost of the substitute housing), is significant for two reasons. First, the case again alerts consumers to the availability of relief under some state consumer protection statutes in landlord-tenant conflicts (in addition to Maryland, attorneys in California, Connecticut, Massachusetts, North Carolina, Wisconsin, and other states have made very effective use of state UDAP statutes to remedy violations of state landlord-tenant laws that do not provide adequate private remedies*). Second, the decision indicates that in any transaction, not just apartment rentals, a seller who fails to obtain proper licensing or registration may violate the state UDAP statute. UDAP violations may include, for example, repairs by unlicensed home improvement contractors and auto repair shops. Major Hayn.

*Not all states consider landlord-tenant matters under the state consumer protection statute. Although landlord-tenant disputes had been consistently among the most frequent complaints handled under the Washington Consumer Protection Act (CPA), the Washington Supreme Court removed such transactions from the purview of the CPA (notwithstanding the clear language of the CPA, relevant Washington precedent, and the result reached in other jurisdictions that have considered the issue), eliminating both direct and indirect actions under the Act. State v. Schwab, 103 Wash. 2d 542, 693 P.2d 108 (1985). The exemption of residential landlord-tenant transactions from direct actions under the CPA produces the illogical result that practices recognized as unfair or deceptive are prohibited by the CPA unless those practices are utilized in the rental of residential housing. For example, bait-and-switch advertising, a deceptive practice designed to lure customers onto the premises, is prohibited by the Washington CPA. Under *Schwab*, however, bait-and-switch advertising is permitted in the rental of residential housing. Furthermore, *Schwab* leaves residential tenants less protected than commercial tenants because unfair or deceptive conduct remains actionable under the CPA in a commercial lease transaction, although typically it will be the less sophisticated residential tenant who is in need of greater protection.

Legal Assistance on Criminal Matters

Criminal law matters are generally outside the scope of legal assistance, Army Regulation (AR) 27–3, Legal Assistance, para. 2–4*a*. This general limitation has caused some confusion as to whether the limitation extends only to actual representation or to the giving of advice. A recent opinion, DAJA–LA 1987/2721a, 17 Feb. 1987, explains the permissible range of assistance on criminal matters.

AR 27–3, Paragraph 2–4*a*, requires that those seeking legal advice on civilian criminal matters be referred to a civilian counsel. That provision, however, does not prohibit providing advice in those cases in which a pro se appearance is appropriate. In such cases it is appropriate to give general advice, provide standard forms, and give assistance in the preparation of these forms. Paragraph 1–5 recognizes that effective legal assistance may improve morale and lead to increased efficiency. Paragraph 2–2*b* allows an SJA to authorize assistance to individuals having personal legal difficulties in areas of law other than those specifically authorized. The loss of driving privileges by soldiers could adversely affect the mission and effectiveness of a command. The difficulties that could be resolved by counseling the soldier about the offense charged and procedures to be followed, including providing the soldier with a form to use in pleading nolo contendere, would have a significant and positive impact upon soldiers and the command. It therefore would be proper to authorize such assistance.

Further, a legal assistance officer could provide general information to clients concerning proceedings in a civilian criminal court or before a U.S. Magistrate. This may include advice such as maximum punishment, the impact of a civilian criminal conviction on a soldier's military career, the importance of responding to a summons, the need for and means of selecting a civilian counsel, etc. It may also be appropriate to assist a client secure a delay in such proceedings and secure information concerning the charges from a prosecutor or court clerk. Legal assistance officers may not, however, make an appearance on behalf of a client without prior approval of The Judge Advocate General. Such requests will only be granted in exceptional cases. Major Mulliken.

Legal Assistance for Civilian Employees

Civilian employees are generally only eligible for legal assistance if employed by and accompanying the Armed Force overseas. AR 27–3, para. 1–8*a*(8). Offices have questioned whether key civilian employees who would deploy during mobilization could be extended legal assistance for wills and powers of attorney, since their readiness for deployment would further the mission of the command. A recent opinion, DAJA–LA, 20 Feb. 1987 provides some guidance.

Providing legal assistance to ensure military readiness is for the benefit of the Army. Accordingly, the restrictions of 10 U.S.C. § 1044 (1982) do not apply to legal assistance that ensures that employees are ready to perform their mission.

Although providing wills and powers of attorney for civilian employees in the United States is not specifically authorized by Army Regulation 27–3, paragraph 1–10 of that regulation allows staff judge advocates to deviate from the regulation. Accordingly, staff judge advocates may provide those services now or wait until the employees are prepared to deploy. The determination of when the service will be provided will depend on the availability of assets and other local concerns.

If this assistance is provided, it must be performed on a space available basis without any increase in staffing levels. This assistance should be limited to premobilization counselling and the preparation of routing documents such as wills and powers of attorney. Major Mulliken.

VA Loans

Many military families will move this summer and purchase homes at their new locations. Frequently, this will involve VA financing. In most circumstances, when one applies for a VA loan, the lender commits to close the loan at the prevailing VA rate at the time of closing. This means that the borrower will not know what the actual interest rate will be until the loan is closed. This is in contrast to most conventional loans, where the lender makes a commitment as to the final interest rate at the time a loan commitment is issued. The result is that with the normal VA loan, the borrower will receive the benefit of rate decreases from the time of application to closing, but will also have to pay interest at the increased rate if rates go up.

While this is the general rule, borrowers should be aware that it is possible for a borrower to receive an unconditional commitment from a lender on a VA loan that would lock in the interest rate and not have it float until closing. The VA policy concerning rate fluctuations after application is explained in DVB Circular 26–84–16 and can be obtained from the Department of Veterans Benefits, Veterans Administration, Washington, D.C. 20420. With predictions of interest rate increases over the next few months, borrowers may want to consider obtaining an unconditional commitment on VA financing. Major Mulliken.

Alternative Dispute Resolution

The first course on Alternative Dispute Resolution (ADR) was held at The Judge Advocate General's School from 17 to 20 February 1987. The course was attended by representatives of all branches of the service, including the chiefs of legal assistance for the various services. The course examined how alternative dispute resolution techniques could be used at the installation level. During the course, Ms. Shari Hill from Fort Hood, Texas, discussed the Village Court Program, a test program that has recently been established at Fort Hood. This program, in which judge advocates serves as mediators and arbitrators, provides a mediation—arbitration system to resolve disputes between occupants of the post housing area. There is great potential for use of ADR at the installation level both in the United States and overseas. ADR can be used to resolve off-post disputes between landlords and soldiers, consumer law complaints between merchants and soldiers, domestic relations cases, and other disputes involving members of the military community and others. ADR systems vary as to type of procedure employed and the amount of resolution authority given the mediator or arbitrator. Most attorneys are already familiar with arbitration, in which a neutral third party is presented with information about the case by both sides to a dispute. The arbitrator's purpose is to encourage communication and to help the parties reach

agreement. If the parties fail to agree, the arbitrator is given the authority to impose a decision.

Mediation is another form of ADR that has grown dramatically in popularity. Like arbitration, mediation uses a neutral third party whose purpose is to facilitate communication between the parties, help the parties define the issues and identify alternatives, and to assist the parties in reaching an agreement. Unlike arbitration, the mediator may not impose a decision on the parties. Both parties are free to terminate the mediation at any time. While this initially sounds like a disadvantage, it offers some advantages. First, because no decision can be imposed, the parties view mediation as less threatening than other forms of dispute resolution and the parties may therefore be more willing to participate in mediation. Second, proponents of mediation claim that the parties will more likely abide by a decision if the decision is "their" decision, rather than one imposed upon them. Mediation attempts not only to help the parties reach a decision, but also to teach the parties how to resolve future problems by themselves without the assistance of a third party. Consequently, mediation may be most appropriate for disputes involving parties who will have a future relationship, such as divorcing or separating parents who will see each other in the future because of child visitation rights, or landlords-tenants who are parties to a lease that will continue for some time.

Legal assistance officers are encouraged to explore what ADR systems are already offered in their areas and available to their clients. Additionally, where the need exists, legal assistance officers should consider proposing to their staff judge advocates that ADR systems be established at their installations. Major Mulliken.

Soldiers' and Sailors' Civil Relief Act

The Legal Assistance Branch is in the process of revising the chapter in the *Legal Assistance Officer's Deskbook and Formbook* on the Soldiers' and Sailors' Civil Relief Act. All reported cases concerning the Act are being collected and reviewed for inclusion in the reference. Frequently, however, rulings concerning the Act are not reported because the case is never appealed. Legal assistance officers are encouraged to inform the Branch of any cases or experiences involving the Act that should be considered for inclusion in the reference. Information should be sent to The Judge Advocate General's School, ATTN: ADA–LA, Charlottesville, Virginia 22903–1781.

Legal Assistance Mailout

In February, all offices should have received mailout number 87–1 from the Legal Assistance Branch. Included in the mailout were the *Legal Assistance Officer's Federal Income Tax Supplement* and the *All States Income Tax Guide*, purchased by the Army Law Library Service. Additionally, copies of the Air Force Shortbursts Newsletters for October/November 1986 and December 1986 were included. All offices were provided with an excellent reference entitled *Essentials for Attorneys in-Child Support Enforcement*, which came courtesy of the U.S. Department of Health and Human Services. The Immigration and Naturalization Service provided copies of their *Guide to Immigration Benefits*. Although this handbook provides excellent resource material, it has not been updated recently and its information should be verified with current statutes.

Legal assistance offices that did not receive the mailout should send a written request for the materials with a correct mailing address to The Judge Advocate General's School, ATTN: ADA–LA, Charlottesville, Virginia 22903–1781.

Claims Report

United States Army Claims Service

Exercise in Alchemy: Funding the Army Claims Program

Lieutenant Colonel Paul M. Seibold
Chief, Management and Budget Division

An important dimension of the Army claims program that Army claims practitioners seldom see is the process of providing the roughly $90 million to pay the over 160,000 claims that are approved worldwide each fiscal year. An understanding of this process will assist judge advocates to plan and execute local funding requirements and to advise commanders and claimants about the availability of claims funds.

The Department of Defense Budget Guidance Manual (DOD 7110–1–M) prescribes the appropriation "Claims, Defense" as a discrete item in the annual budget cycle, which includes estimate submission and justification as well as budget execution and reporting. The appropriation covers the following kinds of claims, which are listed as they appear in the annual estimate, along with the governing authority and the applicable chapter in Army Regulation 27–20:[1]

[1] Dep't of Army, Reg. No. 27–20, Legal Services—Claims (18 Sept. 1970) [hereinafter AR 27–20].

Personnel Claims

Military and Civilian Personnel, 31 U.S.C. § 3721 (Chapter 11)

Marine Casualty, 5 U.S.C. § 5348

Repayment of Erroneous Collections, Table 10–15, AR 37–100

Correction of Military Records, 10 U.S.C. § 1552

Tort Claims

Federal Tort, 28 U.S.C. §§ 2671–2680 (Chapter 4)

Foreign (Individuals), 10 U.S.C. § 2734 (Chapter 10)

Foreign (Status of Forces Agreement (SOFA)) Reimbursements), 10 U.S.C. § 2734A (Chapter 10)

Noncombat Activities, 10 U.S.C. § 2733 (Chapter 3), 32 U.S.C. § 715 (Chapter 6)

Compromise Settlements, 28 U.S.C. § 2677

Nonscope of Employment, 10 U.S.C. § 2737 (Chapter 5)

Industrial Security, DOD Directive 5220.6

Admiralty Claims

10 U.S.C. §§ 4801–4804, 4806 (Chapter 8)

Other Miscellaneous Claims

39 U.S.C. §§ 406, 411, 2601 (Chapter 13)

The appropriation does not cover Federal tort claims settled for more than $2,500.00,[2] noncombat activity claims settled for more than $100,000.00[3] claims paid from nonappropriated funds[4] or claims paid from civil works funds.[5]

Among the kinds of claims covered by the Claims, Defense appropriation, the level of Army activity varies widely. The categories of Marine Casualty, Compromise Settlements, and Industrial Security have been so inactive that no funds have been budgeted for them in recent years. On the other hand, the categories of Military and Civilian Personnel and Foreign (SOFA Reimbursements), as is typical of them, accounted for 50 and 36 percent, respectively, of all claims dollars obligated in Fiscal Year 1985.

The coverage of the Claims, Defense appropriation extends to all three services. The Office of the Assistant Secretary of Defense (Comptroller) (OASD(C)) divides the sum appropriated by Congress among the services, providing each with its own obligational authority in a stated amount. Without exceeding the appropriation, that office can adjust these amounts among the services, taking from one and giving to another; this is especially likely to occur toward the end of a fiscal year on the basis of payment experience. In addition, each service can credit its current-year obligational authority with recoveries from carriers/warehousemen and certain others[6] and thus "earn" extra claims funds. Recoveries accomplished by Army claims activities in the field are reported to the U.S. Army Claims Service (USARCS), which has the exclusive authority to release recovered funds for current-year obligation. Funds recovered under the "affirmative claims" program, *i.e.*, under the Federal Claims Collection Act[7] or the Federal Medical Care Recovery Act,[8] are not available for this purpose.

As stated above, the Claims, Defense appropriation is included in the annual DOD budget cycle. Typically, that cycle starts in early July with a "budget call" letter from OASD(C) that sets the suspense date (around mid-September) and provides special instructions for hard-copy estimates on the respective appropriations. The estimates must cover three successive fiscal years, known as "prior year" (the fiscal year about to expire), "current year" (the fiscal year about to begin) and "budget year" (the fiscal year about to be considered by Congress). A parallel, automated budget estimate is separately tasked, covering "prior year" and the next five fiscal years. Among the many fiscal years for which estimates are required, the focus is clearly on the budget year—two years beyond the year in which the estimate is being made. This poses a problem for the Claims, Defense appropriation, which is budgeted almost entirely on the basis of obligation experience: upward adjustments in the "current year" funding can be accomplished only through reprogramming, which requires congressional approval and offers no assurance of success. In other words, the budget cycle permits a prior-year shortfall to be made up only in the budget year, in effect extending the shortfall through the current year.

In early August, USARCS requests all claims offices to provide estimates for their claims funding needs over the next two years, *i.e.*, "current year" and "budget year." These estimates form the basis for the overall Army estimate pertaining to Military and Civilian Personnel Claims, even though the field estimates may also take account of other claims categories. Command claims services in Germany and Korea provide consolidated estimates for the claims offices they supervise as well as special estimates for Foreign Claims. The latter estimates are combined and adjusted to compromise the Army Foreign Claims estimate. Estimates for the remaining claims categories are based on a review of obligation experience in each category over the past several years. For fiscal years following the current year, estimates are usually made by increasing the previous year's estimate for each category by a modest percentage to account for inflation. Special adjustments can be made, however, for known or anticipated circumstances impacting on particular claims categories in the out-years.

The foregoing reveals that claims budget estimation is more of an art than a science. While a completely new estimate is developed every year, it is also in August that

[2] 28 U.S.C. §§ 2671–2680 (1982), AR 27–20, chap. 4.

[3] 10 U.S.C. §§ 2733–2734 (1982); 32 U.S.C. § 715 (1982); AR 27–20, chaps. 3, 6 and 10.

[4] AR 27–20, chap. 12.

[5] AR 27–20, para. 2–21*f*.

[6] Dep't of Army, Reg. No. 37–100, Financial Administration—Account/Code Structure, para. 10–18*e* (27 Jan. 1986).

[7] 31 U.S.C. § 3711 (1982).

[8] 42 U.S.C. §§ 2651–2653 (1982).

Congress begins to "mark" (for which read "decrease") the budget year estimate, which, of course, is about to become the current year estimate. The DOD Budget Guidance Manual prescribes procedures for appealing adverse congressional actions through OASD(C), though this Service has not, as yet, found it opportune to do so.

The Army's hard-copy budget estimate for Claims, Defense includes narratives, tables and summary sheets, and is twenty-eight pages long.[9] The automated estimate contains figures developed from the hard copy and fits on one printout page. Mere timely submission of these estimates does not complete the cycle. OASD(C) consolidates the three services' claims estimates and, toward the end of October, issues a Program Budget Decision (PBD) that reflects the combined service estimate, OASD(C)'s "alternative" (for which read "decreased") estimate and the by-service distribution of the alternative estimate for the current and budget years. The services have the option to reclama or "non-reclama" the PBD. A non-reclama is soon rewarded with a memo from OASD(C) providing the service concerned with its current-year obligational authority.

Does the arrival of the hard-won obligational authority conclude the claims budget process? Not on your moneybags! For one thing, in all likelihood there will have been a Continuing Resolution Authority (CRA) in effect since 1 October. That means USARCS, upon direction from the Office of the Comptroller of the Army, has had to keep all 130 or so claims offices informed as to when they could obligate funds, and up to what limit. At about the same time, USARCS provides OASD(C) updated figures for the prior-year column of the budget estimate, reflecting actual rather than estimated values. Only after the current-year appropriation becomes law can USARCS divide the lump-sum obligational authority among the claims offices. This is accomplished by letter affording each office its Claim Expenditure Allowance (CEA); it is then up to each claims office to monitor its obligations, report its recoveries (as discussed above), and request additional funds if needed. For its part, USARCS maintains a running total of reported recoveries and CEA adjustments as well as a record of each office's current-year CEA history, all the while responding to claims office requests for CEA increases insofar as funds are available. CEA management becomes particularly hectic in September, when claims offices report their current-year obligational activity and USARCS moves surplus funds (if any) among offices to satisfy year-end needs. USARCS also computes the total obligations for the entire year, which must not exceed the sum of the current-year obligational authority plus total current-year recoveries.

All of the above has one essential objective: to ensure the availability of funds for paying meritorious claims. While this seems a bit obvious, the point is that the Army claims program is positive in purpose. Thus, the settlement of personnel claims is a quality of life factor for entitled members and employees; the settlement of federal tort claims provides compensation for everything from fender-benders to medical malpractice; and SOFA reimbursements support our maneuver rights under international agreement. As much as these and the other listed claims categories differ in substance and procedure, they all culminate in the transfer of money to deserving claimants. To this end, each individual claims office must be concerned with its own CEA; but USARCS must be concerned with the totality of all offices' needs. These interests are harmonious enough in "fat" years, when the Army claims program is fully funded as the result of canny budgeting two years before and the absence of disastrous developments in the meantime (such as the severe limitation in Fiscal Year 1986 SOFA reimbursements resulting from the dollar's decline against the German mark). In "lean" years, however, these interests diverge if USARCS has to underfund individual claims offices to support claims payments elsewhere. Under such circumstances, claims offices must stretch available dollars while USARCS budgets to make up the difference—the year after next.

Department of the Army

Appropriation: Claims, Department of Defense

Activity: Tort Claims

Justification of Estimates

Federal Tort Claims Act (28 USC §§ 2671–2680; Chapter 4, AR 27–20)

($ in thousands)

Budget Execution FY 1986 (Est)	President's Budget FY 1987	Budget Estimate FY 1988	Budget Estimate FY 1989
$2,100	$2,352	$2,470	$2,594

Under the provisions of the Federal Tort Claims Act, 28 USC §§ 2671–2680, The Department of the Army is responsible for the administrative settlement of personal injury, property damage or wrongful death claims against the United States caused by the negligence, wrongful acts or omissions of military personnel or civilian employees of the Department of Defense and the Department of the Army, acting within the scope of their employment within the United States or its territorial possessions. An amendment of 18 January 1967 requires all tort claims, regardless of amount, to be filed with and considered administratively by the federal agency involved as a prerequisite to filing suit in federal district court. Under this Act, awards in excess of $2,500.00 are not charged to the DOD, Claims appropriation.

The number of claims settled has remained relatively constant, while the average settlement cost per claim has continued to increase. The increased settlement cost consists mainly of individual automobile accidents and reflects the increased cost of repair work, increased values of automobiles and a general increase in the medical payment for treatment of injuries suffered as a result of accidents as well as other incidents. For FY 1988, it is estimated that $2,470,000.00 will be required to settle 2,701 claims; for FY 1989, the estimate is 2,755 claims at $2,594,000.00.

Figure 1. Sample Page, Budget Estimate

[9] An example of one such page is at figure 1.

Personnel Claims Note

This note is designed to be published in local command information publications as part of a command preventative law program.

This month's note concerns safeguarding your possessions. Tape deck and CB radios are attractive items to thieves. If your car's tape deck or CB radio is not permanently installed, you must place it in the luggage compartment where it is out of sight and locked up. Neither private insurance companies nor the U.S. Army Claims Service will pay for easily pilferable items where the owner has not properly safeguarded his or her property. If you are the victim of a theft or robbery, make a police report within twenty-four hours to help with a speedy investigation. This is a general requirement before any theft claim can be paid by the Army.

If you have unusually nice or expensive personal property, you should substantiate your ownership and the property's value in the event that you have to file a claim with either your private insurer or the claims office. Photographs, written appraisals, lists showing serial numbers, and purchase receipts will help you if you have to file a claim for property lost during an authorized move or stolen from government quarters. You should buy private insurance for your personal property because the Claims Service can only pay limited amounts for service-connected losses.

Management and Budget Note

Claims offices are reminded of the guidance in chapter 5 of the DA Form 3 Handbook to the effect that Part II (Copy 2, 3, or 4), DA Form 3, will normally be prepared immediately to report settlement of a claim and that Copy 5 will be used as a cover sheet when forwarding claim files to another claims office or to the Claims Service. Part II will be mailed to the Claims Service, ATTN: JACS–MB, as soon as settlement is accomplished. When a claim file is forwarded to the Claims Service for retirement, that file and Copy 5 will be directed to the Claims Service, ATTN: JACS–PCR. Part II will never be included with the forwarded claim file but must be mailed separately as indicated.

Automation Notes

Information Management Office, OTJAG

Hardware Corner

Personal Computer Attorney Workstation

The ideal attorney workstation does not require a rocket scientist to operate, is cheap enough to buy in quantity, and can be ordered and delivered quickly. The ideal workstation can run all types of software and communicate with every available database. It will never become obsolete. With the ideal workstation, an attorney can immediately prepare routine documents, compose briefs, research cases, schedule future events, monitor the docket, and keep records. Any task can be accomplished by merely staring at the computer and thinking about what needs to be done.

The Zenith Z–248 microcomputer with Enable and DisplayWrite 3 software is one system that can be used to start building this type of workstation in JAGC offices.

The Z–248 uses the Intel 80286 microprocessor operating at a clock speed of 8 Mhz with no wait states, so it is almost twice as fast as most other top-of-the line systems and eight times faster than the original PC. Even so, it can use most programs written for the IBM. Its blazing speed makes the Z–248 fun to use; the operator does not have to sit for minutes waiting for DisplayWrite 3 to check spelling or paginate a document. It all happens right away. As reported in *Byte* magazine, "If performance is the primary factor . . . the Zenith Z–248 is the obvious front-runner. This machine is significantly faster than the competition and is well built and well supported."[1]

The Z–248 comes with an incredible amount of documentation, but it also has short-cut manuals and procedures that will get the operator up and running quickly. For probing the inner mysteries of DOS and BASIC, the Zenith manuals are among the most straight-forward and complete in the business.

The Z–248 is now available on the Joint Microcomputer Contract No. F19630–86–002 (see following). When first announced, the Z–248 contract was highly touted.[2] JAGC experience supports this conclusion. Currently, fifty-eight Z–248's, all equipped with Enable and DisplayWrite 3, are hard at work in OTJAG offices. Complaints are minimal and substantial productivity gains, in the range of 30–40% (after initial training), have been reported. Size is the Z–248's major drawback; the thing is big. It is made that way so that as needs grow, expansion cards can be used to increase its capability. In any event, it will take up a good part of any desk.

A sample configuration for a Zenith Z–248 attorney workstation follows:

CLIN	Part Number	Description	Contract Price
003	ZWX–248–62	Advanced Computer System	$1658.00
0011	ZVM–1380	RGB Color Monitor	302.00
0014AB	HCA–80	Surge Suppressor	30.00
0015	AFP–51	Dial Up 2400 Baud Modem	158.00
0031	SG–5063–1	ENABLE Software	87.00

[1] Rash, *System Review: Four IBM PC AT Clones*, Byte, Dec. 1986, at 247.

[2] Chapman, *Follow-On Zenith Z–248*, Chips Ahoy, April 1986, at 3.

GSA Schedule			
IBM DisplayWrite 3	Word Processing Software		265.00
		Total	2500.00

Also available on the GSA schedule are printers ranging from inexpensive dot matrix models to typeset quality laser printers. Captain David L. Carrier, Software Development Officer, OTJAG.

Say It With a KISS

Q: What's more impressive to a military judge than fresh-from-the-dryer PermaPrest double-knit Class A's?

A: Briefs, pleadings, and other documents produced on a laser printer, replete with italics, right-justified margins, and proportionally spaced text, that's what.

There are many different kinds of printers that are suited to do many different kinds of jobs. For economically producing type set quality work at blazing speed, however, there is nothing like a laser printer. The Information Management Office at OTJAG has had the use of a QMS "KISS" (Keep It Smart and Simple) laser printer for the past several months and it works like a charm.

Like the better-known Hewlett-Packard LaserJet, the KISS uses a Canon-brand laser engine to put the letters on the page. From a distance, the LaserJet and the KISS are identical twins; the difference lies in the KISS' control panel and its built-in capabilities. For example, the KISS emulates three popular printers, the Diablo 630, the Epson FX–80, and the QUME Sprint, so your DisplayWrite 3 word-processing software can use it immediately. With a little effort, you can set up your DisplayWrite 3 package to use the seven fonts or type faces that come with the KISS. This will allow you to italicize rather than underline case names and to emphasize headings with larger or different style type. Unlike the HP LaserJet, there are no extra font cartridges to buy. Two "Landscape" fonts also come built-in. This permits printing sideways on the page to get all columns on one piece of paper. If more fonts are desired, you can purchase "downloadable" fonts that can be put in your computer and transmitted to the printer (it is easier than it sounds). The KISS uses standard toner cartridges that cost about $90.00 each and are good for 2500–3000 copies before replacing.

List price for the KISS is $1995.00, about $1000.00 less than the LaserJet. It can be purchased at discount for about $1800.00, which is some $800.00 less than LaserJet's government price. This print technology is significantly more expensive than the daisy wheel type, but it is unmatched for quality and speed. You can save money by sharing the printer among several workstations by using simple data switches, as both Defense and Government Appellate Divisions at the U.S. Army Legal Services Agency do with LaserJet printers. This type of laser can print up to eight letter size pages of text per minute versus one or two pages per minute for a daisy wheel printer.

Versatility and high print quality are reason enough to choose the laser option. Even more convincing, however, will be its contribution to your productivity when long briefs or reports are due immediately or when the volume of work is heavy.

NOTE: At the time of this writing, trade publications have reported that a new type of laser printer, based on a more advanced laser engine, will be announced by HP in March 1987 and that the price of the older models will be significantly reduced. This new printer is supposedly much smaller and less expensive than the current generation of laser printers and should be evaluated closely before any purchase decision is made. Captain David L. Carrier.

Software Corner

Word Processing

IBM's DisplayWrite 3 is a top-of-the-line word processing package. Anything you can do with a pad and pencil, scissors and paste, it can do better. It can check your spelling, paginate your brief, number your footnotes, and put them on the correct pages. It can take your form letter and send it to everyone on your mailing list, and the features go on and on. It is menu-driven, which means it is easy to use. It is the LAAWS standard full-featured word processor. Once you learn it, you will use it again at your future assignments.

Watch this space for "Hints On How" to use this powerful word processor. If you've had a problem or question, write or call. We'll share the question and answer with other JAGC PC users.

Everything Else

Another portable skill is proficiency with the Enable integrated software package. Database, spreadsheet, telecommunications, graphics, and minor word-processing functions can all be performed with this single product. Enable, a LAAWS Level One software package, replaces the swarm of individual programs that you would have to assemble to do each of these tasks. Enable integrates all these functions in a smooth, professional manner that is easy to learn and use. It is also one of many bargains on the Joint Services Micro Contract—only $87.00 for a package that sells at discount for nearly $400.00, and lists for close to $700.00.

If you have had a problem with Enable, or figured out some great use for it, write us and we will share the news. Captain David L. Carrier.

Criminal Investigation Note

U.S. Army Criminal Investigation Command

Release of Reports of Investigation to Respondents of Administrative Actions

Recently, questions have been raised as to the propriety of releasing Criminal Investigation Division (CID) investigative reports contained as exhibits in, or forming the basis for, adverse administrative personnel actions to the individual respondent.

Army Regulation 195–2[1] addresses this issue. The regulation allows disclosure by individuals, agencies, or components receiving CID investigative reports as needed for administrative proceedings, as well as for non-judicial and judicial purposes or proceedings. For example, disclosure of a CID report of investigation (ROI) by a commander to the respondent as contemplated by provisions of Army Regulation 635–200[2] is allowed if the separation action is based on information contained in the ROI. Likewise, disclosure of a CID ROI by the civilian personnel office to a civilian employee facing an adverse Merit Systems Protection Board personnel action is permitted as required by statute and regulation.[3] These types of disclosures are considered routine use disclosures under the Privacy Act[4] and the Army Privacy Program.[5]

Other requests for CID investigative reports should be treated as Freedom of Information (FOIA) or Privacy Act requests and forwarded to the Director, U.S. Army Crime Records Center, ATTN: CICR–FP, 2301 Chesapeake Ave., Baltimore, MD 21222–4099. Questions regarding CID policy on release of CID ROIs may be addressed to: Staff Judge advocate, HQUSACIDC, 5611 Columbia Pike, Falls Church, VA 22041–5015; telephone AUTOVON 289–2281/2282, commercial (202) 756–2281.

[1] Dep't of Army, Reg. No. 195–2, Criminal Investigations—Criminal Investigation Activities, para. 4–31 (30 Oct. 1985).

[2] Dep't of Army, Reg. No. 635–200, Personnel Separations—Enlisted Personnel (5 July 1984).

[3] *See* 5 U.S.C. § 1201.7 (1982).

[4] 5 U.S.C. § 552a (1982).

[5] Dep't of Army, Reg. No. 340–21, Office Management—The Army Privacy Program, para. 3–2*c*(3) and (4) (5 July 1985).

Bicentennial of the Constitution

Bicentennial Update: Opening of the Constitutional Convention

Congress accepted the report of the Annapolis Convention on February 21, 1787, and granted approval for the proposed convention in Philadelphia. Even then, six states had already appointed delegates to the convention: New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, and Georgia. By June, another six states had appointed delegations: New Hampshire, Massachusetts, Connecticut, New York, Maryland, and South Carolina.

In the months leading up to the convention, the delegates prepared diligently, noting the changes they would have to make to the Articles of Confederation. James Madison of Virginia, who would be a leading participant, made the following notes listing the weaknesses he saw in their present system:

Vices of the Political System of the United States

1. Failure of the States to comply with the Constitutional Requisitions.

2. Encroachment by the States on the federal authority.

3. Violations of the law of nations and treaties.

4. Trespasses of the States on the rights of each other.

5. Want of concert in matters where common interest requires it.

6. Want of Guaranty to the States of their Constitutions and laws against internal violence.

7. Want of sanction to the laws, and of coercion in the Government of the Confederacy.

8. Want of ratification by the people of the Articles of Confederation.

9. Multiplicity of the laws of the several States.

The Constitutional Convention convened in Philadelphia on May 25, 1787. The delegates unanimously elected George Washington president of the Convention. In a speech to the delegates during the first phase of the Convention, he reminded the delegates of the difficulty of the task they had set:

> It is too probable that no plan we propose will be adopted. Perhaps another dreadful conflict is to be sustained. If to please the people, we offer what we ourselves disapprove, how can we afterwards defend our work? Let us raise a standard to which the wise and honest can repair.

This was one of only two occasions that Washington spoke to the assembled Convention. For the remainder of the time that the delegates met, he maintained order and directed business as the presiding officer. Washington made his influence felt through private letters, dinner meetings, and conversations with the delegates.

The delegates adopted an oath of secrecy that prohibited repeating in public, printing, or publishing anything spoken during the debates. Benjamin Franklin's garrulous nature was well known; he had delegates assigned to accompany him whenever he went to any taverns to ensure that he did not speak too freely. James Madison later said that the Convention would have failed had it been held in public.

Bicentennial Essay Contest

The Judge Advocate General's School is now accepting entries for the first of the annual Bicentennial essay contests. This year's contest is open to Army military and civilian attorneys. The entry deadline is June 30, 1987. A complete listing of qualifications and rules for the contest may be found in *The Army Lawyer*, January 1987, at 48.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Senior Reserve Judge Advocate Positions

The authority to select judge advocates for assignment as Military Law Center (MLC) commanders, Army Reserve Command (ARCOM) staff judge advocates, and General Officer Command (GOCOM) staff judge advocates is reserved to The Judge Advocate General by Army Regulation 140–10, paragraph 2–28. The Judge Advocate General by letter has delegated this authority to the Commandant, The Judge Advocate General's School.

Officers selected for these positions are assigned with a three year tenure. The tenure rule has a dual purpose. First, it is intended to enhance readiness by creating as many professional development opportunities for senior officers as possible. Second, it is intended to provide a reasonable measure of command and staff stability.

Tenure reductions and extensions are permitted on a very limited basis. Normally, an officer will not be considered for a different position unless the tenure period is substantially completed. Tenure extensions are permitted only if no other officers of the appropriate grade are available to fill the position or a severe adverse impact on the unit's mission is likely to be caused by a personnel change.

Officers are nominated for these positions by the ARCOM or GOCOM commander, as appropriate. All eligible officers within a reasonable commuting distance, including officers in the Individual Ready Reserve, must be considered in the nomination process. A list of eligible officers can be obtained from the Judge Advocate Guard and Reserve Affairs Department or the staff judge advocate of the Continental United States Army (CONUSA) in the unit's chain of command.

Nominations are submitted through the CONUSA staff judge advocate and the United States Army Forces Command (FORSCOM) staff judge advocate to the Commandant, The Judge Advocate General's School. They must be submitted early enough to reach The Judge Advocate General's School at least six months before the expiration of the incumbent's tenure.

Positions that will become available during the next year are listed below. Interested officers should contact unit commanders by mail.

ARCOM	Address	Position Available
77	New York	February 1988
99	Pennsylvania	October 1987
81	Georgia	January 1987
83	Ohio	October 1987
89	Kansas	Open
63	California	January 1987
MLC		
42	Pennsylvania	October 1987
139	Kentucky	January 1988
174	Florida	January 1988
9	Ohio	Open
8	Maryland	October 1987
78	California	January 1987
Training Divisions		
76	Connecticut	July 1987
98	New York	Open
108	North Carolina	July 1987
84	Wisconsin	September 1987
85	Illinois	June 1987
GOCOMS		
352 CA CMD	Maryland	Open
300 SPT GP	Virginia	Open
200 MP BDE	Maryland	Open
290 MP BDE	Florida	Open
143 TRANS BDE	Florida	November 1987
416 ENG BDE	Illinois	October 1987
300 MP BDE	Michigan	Open
156 SPT GP	New Mexico	Open
321 CA GP	Texas	Open
326 SPT GP	Kansas	Open
377 TAACOM	Louisiana	September 1987
420 ENG BDE	Texas	Open
351 CA CMD	California	Open
HQ IX CORPS	Hawaii	October 1987

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

May 4-8: 3d Administration and Law for Legal Specialists (512-71D/20/30).

May 11-15: 31st Federal Labor Relations Course (5F-F22).

May 18-22: 24th Fiscal Law Course (5F-F12).

May 26-June 12: 30th Military Judge Course (5F-F33).

June 1-5: 89th Senior Officers Legal Orientation Course (5F-F1).

June 9-12: Chief Legal NCO Workshop (512-71D/71E/40/50).

June 8-12: 5th Contract Claims, Litigation, and Remedies Course, (5F-F13).

June 15-26: JATT Team Training.

June 15-26: JAOAC (Phase IV).

July 6-10: US Army Claims Service Training Seminar.

July 13-17: Professional Recruiting Training Seminar.

July 13-17: 16th Law Office Management Course (7A-713A).

July 20-31: 112th Contract Attorneys Course (5F-F10).

July 20-September 25: 113th Basic Course (5-27-C20).

August 3-May 21, 1988: 36th Graduate Course (5-27-C22).

August 10-14: 36th Law of War Workshop (5F-F42).

August 17-21: 11th Criminal Law New Developments Course (5F-F35).

August 24-28: 90th Senior Officers Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

July 1987

4-5: MLS, Litigating Psychological Injuries, Kona, HI.

5-10: AAJE, A Judge's Philosophy of Law, Williamsburg, VA.

5-24: NITA, National Session: Trial Advocacy, Boulder, CO.

7-10: FPI, Fundamentals of Government Contracting, San Diego, CA.

7-12: NJC, Judicial Writing—Graduate, Middlebury, VT.

7-12: NJC, Dispute Resolution, Middlebury, VT.

9-10: PLI, Antitrust Institute, Los Angeles, CA.

12-17: NJC, Civil Law, Reno, NV.

12-24: NJC, The Decision Making Process, Reno, NV.

12-7: NJC, General Jurisdiction, Reno, NV.

13-17: AAJE, Fact Finding & Decision Making, Williamsburg, VA.

18-26: PLI, Trial Advocacy, N.Y.

19-24: NJC, Civil Evidence, Reno, NV.

20-24: FPI, Concentrated Course in Government Contracts, Las Vegas, NV.

20-31: AAJE, The Trial Judges' Academy—Special Jurisdiction, Charlottesville, VA.

20-31: AAJE, The Trial Judges' Academy—General Jurisdiction, Charlottesville, VA.

21-7/3: NJC, Administrative Law: Fair Hearing, Reno, NV.

23-24: PLI, Antitrust Institute, Chicago, IL.

26-31: NJC, Criminal Evidence, Reno, NV.

27-31: FPI, Concentrated Course in Construction Contracts, Colorado Springs, CO.

28-7/3: NJC, Administrative Law: High Volume Proceedings, Reno, NV.

30-31: PLI, Creative Real Estate Financing, N.Y.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1987 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	30 September annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 December annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1987 issue of The Army Lawyer.

Current Material of Interest

1. Article 137, UCMJ, Training Videotapes

The Criminal Law Division, TJAGSA, has received several inquiries concerning the Article 137, UCMJ, videotapes. New videotapes were distributed to the field in September 1986 superseding the previous Article 137 training films created in 1975. Distribution was made to installation Training and Audiovisual Support Centers (TASC) and to Reserve Training Divisions.

The videotapes are entitled "The Uniform Code of Military Justice, Part I, The Punitive Articles" (SAVPIN No. 701608DA) (24 minutes in length) and "The Uniform Code of Military Justice, Part II, The UCMJ in Action" (SAVPIN No. 701609DA) (35 minutes in length). These releases are available only in ¾" videotape format.

These tapes are designed to provide basic instruction on the UCMJ to help fulfill the Article 137 training requirements. The tapes have been purposely kept short in length to allow for follow-up instruction tailored to the audience. Note, however, that these videotapes do not cover the recent changes regarding jurisdiction over Reserve Component personnel.

A detailed description of the contents of these videotapes is contained in the October and November 1986 DA Visual Information Distribution Bulletins. Requests for these tapes should be made to your supporting TASC. If your supporting TASC does not have these videotapes, copies may be obtained by the TASC from the U.S. Army Audiovisual Center, Tobyhanna Army Depot, Tobyhanna, Pennsylvania. Major Warren.

2. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314–6145, telephone (202) 274–7633, AUTOVON 284–7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD A174509	All States Consumer Law Guide/ JAGS–ADA–86–11 (451 pgs).
AD B100236	Federal Income Tax Supplement/ JAGS–ADA–86–8 (183 pgs).
AD B100233	Model Tax Assistance Program/ JAGS–ADA–86–7 (65 pgs).
AD B100252	All States Will Guide/JAGS–ADA–86–3 (276 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All-States Law Summary, Vol I/ JAGS–ADA–85–7 (355 pgs).
AD B094235	All States Law Summary, Vol II/ JAGS–ADA–85–8 (329 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).

Claims

AD B087847 Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS–ADA–84–5 (176 pgs).

AD B087849 AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).

AD B087848 Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).

AD B100235 Government Information Practices/ JAGS–ADA–86–2 (345 pgs).

AD B100251 Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).

AD B087850 Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).

AD B100756 Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).

AD B100675 Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845 Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).

AD B088204 Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs.)

Criminal Law

AD B107951 Criminal Law: Evidence I/ JAGS–ADC–87–1 (228 pgs).

AD B100239 Criminal Law: Evidence II/ JAGS–ADC–87–2 (144 pgs).

AD B100240 Criminal Law: Evidence III (Fourth Amendment)/JAGS–ADC–87–3 (211 pgs).

AD B100241 Criminal Law: Evidence IV (Fifth and Sixth Amendments)/JAGS–ADC–87–4 (313 pgs).

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).

AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 55–27	Vehicle Shipment Forecast		28 Jan 87
AR 71–9	Materiel Objectives and Requirements		20 Feb 87
AR 215–6	Armed Forces Professional Entertainment Program Overseas		15 Jan 87
AR 351–24	Affiliation of Civilian Institutions With Army Medical Facilities Program	1	30 Jan 87
AR 570–4	Manpower Management		15 Feb 87
AR 700–141	Hazardous Materials Information System		20 Jan 87
AR 703–1	Coal and Petroleum Products Supply and Management Activities		5 Jan 87
AR 725–1	Special Authorization and Procedures for Issues, Sales and Loans		30 Jan 87
AR 740–7	Safeguarding of DLA Sensitive Inventory Items, Controlled Substances; & Pilferable Items of Supply		4 Nov 85
DA Pam 27–173	Trial Procedure		15 Feb 87
DA Pam 420–10	Space Management Guide		5 Feb 87
DA Pam 570–563	Staffing Guide for U.S. Army Recruiting Brigade Headquarters		12 Feb 87
DA Pam 710–4	Management of Excess Material and Material Returns		13 Feb 87
DA Pam 738–751	Functional Users Manual for the Army Maintenance Management System—Aviation		19 Dec 86
Cir 25–300–87–1	Secretary of the Army Awards for Improving Publications		29 Feb 87
Cir 350–85–4	Standards in Weapons Training	1	1 Nov 86
JAG Supp to AR 25–400–2	Information Management, The Modern Army Recordkeeping System	1	2 Feb 87
UPDATE 8	Message Address Directory		30 Jan 87
UPDATE 10	Enlisted Ranks Personnel		30 Jan 87
UPDATE 10	All Ranks Personnel		13 Feb 87

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Allen, *A Report on the Status of the Residual Exceptions to the Hearsay Rule,* 30 Trial Law. Guide 265 (1986).

Appel, Nix v. Whiteside: *The Role of Apples, Oranges, and the Great Houdini in Constitutional Adjudication,* 23 Crim. L. Bull. 5 (1987).

Bendick, *Forensic Child Psychiatry: An Emerging Subspecialty,* 14 Bull. Am. Acad. Psychiatry & L. 295 (1986).

Boyle, *The Legal Distortions Behind the Reagan Administration's Chemical and Biological Warfare Buildup,* 30 St. Louis U.L.J. 1175 (1986).

Chirba-Martin, *Videotaping Testimony of Child Witnesses in Sexual Offense Cases,* 71 Mass. L. Rev. 200 (1986).

Day, *Media Access to Military Courts,* 8 Comm. & L. 3 (1986).

Freilich, Montello & Mueth, *The Supreme Court and Federalism on the Eve of the Bicentennial of the Constitution: A Review of the 1985–86 Term*, 18 Urb. Law. 779 (1986).

Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 Wm. & Mary L. Rev. 1 (1986).

Gardner & Stewart, *Capital Gains and Losses After the Tax Reform Act of 1986*, 65 Taxes 116 (1987).

Graham, *Evidence and Trial Advocacy Workshop: Hearsay—Prior Inconsistent Statements*, 23 Crim. L. Bull. 36 (1987).

Hilen, *The Feres Doctrine and the Department of Defense Quality Assurance Plan: The Road to High Quality Care in Military Medicine*, 7 J. Legal Med. 521 (1986).

Imwinkelried, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 Minn. L. Rev. 269 (1986).

Johnson, *Why You Need A will—A Pamphlet That Explains the Need to a Layperson*, 5 Preventive L. Rep. 59 (1986).

Laternser, *Looking Back at the Nuremberg Trials With Special Consideration of the Processes Against Military Leaders*, 8 Whittier L. Rev. 557 (1986).

Lepow, *Tax Policy for Lovers and Cynics: How Divorce Settlement Became the Last tax Shelter in America*, 62 Notre Dame L. Rev. 32 (1986).

Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 Minn. L. Rev. 97 (1986).

McCord, *Expert Psychological Testimony About Child Complaints in Sexual Abuse Prosecutions: A Foray Into the Admissibility of Novel Psychological Evidence*, 77 J. Crim. L. & Criminology 1 (1986).

Merryman, *Two Ways of Thinking About Cultural Property*, 80 Am. J. Int'l L. 831 (1986).

Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. Pitt. L. Rev. 201 (1986).

Rowles, Nicaragua v. United States: *Issues of Law and Policy*, 20 Int'l Law. 1245 (1986).

Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. Pitt. L. Rev. 1 (1986).

Stevens, *The Third Branch of Liberty*, 41 U. Miami L. Rev. 277 (1986).

Stewart, *The Attorney Work Product Doctrine*, Case & Com., Jan.–Feb. 1987, at 30.

Winslow, *Tax Reform Preserves Structured Settlements*, Taxes, Jan. 1987, at 22.

Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461 (1987).

Note, *Legal Responses to International Terrorism: International and National Efforts to Deter and Punish Terrorists*, 9 B.C. Int'l & Comp. L. Rev. 323 (1986).

Note, *Post-Discharge Failure to Warn: A New Theory Allowing Access to FTCA Recovery*, 75 Ky. L.J. 159 (1986–87).

Note, *Removal Provisions of the Philippine-United States Military Bases Agreement:* Can the United States Take It All?, 20 Loy. L.A.L. Rev. 421 (1987).

Note, "Un-Hatching" Federal Employee Political Endorsements, 123 U. Pa. L. Rev. 1497 (1986).

RESERVED

RESERVED

*U.S. G.P.O. 1987-181-029:60118

By Order of the Secretary of the Army:

JOHN A. WICKHAM, Jr.
General, United States Army
Chief of Staff

Official:

R. L. DILWORTH
Brigadier General, United States Army
The Adjutant General

Distribution. Special.

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

Official Business
Penalty for Private Use $300

SECOND CLASS MAIL
POSTAGE AND FEES PAID
DEPARTMENT OF THE ARMY
ISSN 0364-1287